Supreme Court, U.S.
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No. 08-701

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In The

Supreme Court of the United States

TIMOTHY ALLEN MORRISON, II,
BY AND THROUGH HIS NEXT FRIENDS,
TIMOTHY MORRISON AND MARY MORRISON,

Petitioners,

v.

BOARD OF EDUCATION OF BOYD COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Defendant School's Speech Policies specifically restricted speech under threat of suspension and being turned over to the local or state police. Consequently, Plaintiff refrained from speaking rather than risk punishment. Did the Sixth Circuit err by holding, in conflict with this Court and the First, Second, and Eleventh Circuits, that the Plaintiff did not suffer an injury-in-fact when he refrained from speaking and thus cannot seek relief from a federal court?

2. Did the Sixth Circuit err by holding, in conflict with every other circuit to have addressed the issue, that a request for nominal damages for past harm does not defeat a claim of mootness where the challenged restriction on free speech has been repealed?

LIST OF PARTIES

The Petitioner is the Plaintiff Timothy Morrison. The Respondent is the Board of Education of Boyd County, Kentucky.

In addition, Sarah Alcorn, William Carter, David Fannin, Libby Fugett, Tyler McClelland, and Jane Doe, represented by the American Civil Liberties Union, intervened in this matter and have supported Plaintiff's position on appeal.

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OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Kentucky is reported at 419 F. Supp. 2d 937 (E.D. Ky. 2006), and attached at Appendix ("App.") 83. The first panel decision of the Sixth Circuit reversing the District Court opinion is reported at 507 F.3d 494 (6th Cir. 2007), App. 54. The amended panel's decision affirming the District Court opinion is reported at 521 F.3d 602 (6th Cir. 2008), App. 1. The denial of Plaintiff's and the ACLU intervenors' petition for rehearing and suggestion for rehearing en banc is not reported. App. 105.

JURISDICTION

The Sixth Circuit entered its order upholding the ruling of the District Court on April 9, 2008. Plaintiff and the ACLU intervenors filed for en banc review, which was denied on August 27, 2008. App. 105. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the

> free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Facts

In a prior separate case, several Boyd County High School students sued the District after it denied their request to start a Gay Straight Alliance club on campus. *Boyd County High School Gay Straight*

Alliance v. Board of Education of Boyd County, 258 F. Supp. 2d 667 (E.D. Ky. 2003).[1] The students obtained a preliminary injunction, and the parties ultimately entered into a consent decree where the District agreed, among other things, to put into effect anti-harassment policies and conduct mandatory diversity training for students. *See* 521 F.3d at 605.

The District then adopted the *Boyd County High School Code of Conduct 2004-2005* ("Code of Conduct") that regulated student speech and behavior in the high school. The Code of Conduct, along with Board Policy 09.42811 and the student speech restrictions contained in the District approved training, constituted the Speech Policies that controlled student speech during the 2004-2005 school year.

Board Policy 09.42811 prohibited harassment and discrimination, which it defined as:

> Unlawful behavior based on race, color, national origin, age, religion, sex, actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or

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[1] The student plaintiffs in that case are the same intervening students in the present case who have supported Plaintiff's free speech arguments, and will be referred to as "Intervenors." Likewise, the defendant school district in this case is the same school district in the present case and will be referred to as "District" or "Defendant."

> creates a hostile or abusive educational environment.
>
> The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process. . . .

Id.

Board Policy 09.42811 was not given to students or parents. Rather, students and parents were given the Code of Conduct. In addition to repeating only the first paragraph of the Board policy set forth above (and omitting the second paragraph with its free speech savings clause), the Code of Conduct stated,

> Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.

Id. at 606. The consequences for violating this code provision were severe, including the possibility of a five-day suspension and referral to the Kentucky State Police or the Sheriff's Department.

Defendant also instituted mandatory diversity trainings as part of the consent decree. These trainings instructed students on homosexuality and stated that District policy prohibits students from communicating to a person that homosexual behavior is wrong:

> [J]ust because you believe [that homosexual behavior is wrong], just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. ***Just because you believe that does not give you permission to say anything about it.*** It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. ***There is no permission for you to point it out to them.***

Id. (emphasis added).

Students were also instructed that:

> Humans get confused about that all the time. Regardless of age, regardless of experience, regardless of job, regardless of family, regardless of beliefs, human beings get confused. And we think that it's our job to tell other people they're wrong, or to tell other people "I don't like you," and to make faces and to exclude, and to make little nice groups and keep other people out because they're different. Okay. Groups and difference can't be avoided. Like, dislike, disagreement, can't be avoided. ***It's what you do about it that makes it wrong.*** It's when

> you act against someone. It's when you call them a name. ***It's when you say you're wrong***. Okay so they're wrong. Nothing else is needed. ***You don't need to point out that they're wrong***. . . . You let the other person exist as they are. It's not your job to try to change them, and ***it's not your job to let them know that you believe that they are wrong***.

The instructor then repeated District policy that such speech will not be tolerated at school. Students were told that if they had any questions, they should "consult your Code of Conduct."[2]

These Speech Policies "sparked further acrimony in Boyd County." *Morrison,* 521 F.3d at 605. "[S]ome parents feared that the training would discourage, and the policies would prohibit, their children from speaking about their religious beliefs regarding homosexuality." *Id. see also* Defendant's Answer, ¶ 3 (admitting the allegations in paragraph 3 of the Complaint ("School District policies and practice prohibit students from telling someone who is a homosexual that they believe homosexuality is wrong.")); ¶ 9 (admitting the allegations in paragraph 19 of the Complaint ("This training states that School District policy prohibits any student from telling

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[2] The District admitted that the contents of the training was approved by the District and that it was the final policy-maker for the contents of the transcript for the training.

another student that they believe homosexuality is "wrong" or contrary to their values or beliefs.")).

Plaintiff was one of those children. He was a student at Boyd County High School during the 2004-2005 school year. He had an ideological and sincerely-held religious belief that homosexuality is harmful to those who practice it, and to society as a whole. Believing that he must love and care for his fellow students, he wanted to inform them about his beliefs in an effort to prevent them from doing further harm to themselves and to society.

But Plaintiff became aware of the Defendant's Speech Policies through the Code of Conduct and when his parents attended a pre-screening of the training and learned of the speech restrictions. Because the Defendant's Speech Policies threatened severe punishment if he shared his faith with others concerning the issue of homosexual behavior, he refrained from speaking. Rather than subject himself to discipline, Plaintiff chose to challenge the District's policies through this lawsuit.

Notably, the Intervenors originally joined this litigation to ensure that the District complied with its obligations under the Consent Decree. After reviewing the District's policies, however, the Intervenors agreed with Plaintiff that the policies were unconstitutionally overbroad and joined him in his claim against those policies.

B. The District Court Opinion

Plaintiff filed a Motion for Summary Judgment seeking, among other things, declaratory judgment and damages (compensatory and nominal) on their claim that the District's Speech Policies that were in force during the 2004-2005 school year were unconstitutional.[3]

The district court refused to rule on the constitutionality of Plaintiff's speech claims. The district court dismissed Plaintiff's nominal damage claim stating Plaintiff failed to offer proof of such damages and that Plaintiff failed to make a claim for nominal damages.

> To date, Plaintiffs have failed to substantiate their claim for damages. As Defendants point out, even in response to a direct interrogatory, Plaintiffs were unable to specify the measure and amount of their alleged damages. Notably, in their dispositive motion and reply in support of the same, Plaintiffs refer only to "nominal damages." *However, even their request for nominal damages remains unsupported by any factual allegations. . . .* The only possible basis the Court can discern for any award of damages to Plaintiffs is the limited period of time during which the Board's written policies which were constitutionally

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[3] After the lawsuit was filed, the District changed its Speech Policies.

> suspect. Yet, again, Plaintiffs have made no specific plea.

Morrison, 419 F. Supp. 2d at 946. The district court apparently over-looked Plaintiff's specific request for "actual and nominal damages" due to the free speech violations. *See* Complaint, at 14, ¶ d.

C. The Original Sixth Circuit Opinion

The Sixth Circuit originally ruled 2-1 in Plaintiff's favor. The court reversed the District Court, finding that Plaintiff had made a claim for damages and that the District Court erred in requiring proof of the amount of such damages. "Nominal damages are awarded when there is no proof of an actual injury." 507 F.3d at 501. Therefore, "because nominal damages are a symbolic remedy for past wrongs, a prayer for nominal damages precludes a finding of mootness, even when the defendant has altered or abandoned the allegedly unconstitutional policy. . . ." *Id.*

The court held that an objectively reasonable chilling of speech constitutes an injury-in-fact for Article III purposes. The court described *Laird v. Tatum*, 408 U.S. 1 (1972), as "easily distinguishable:"

> Morrison challenges a *rule* that was intended to govern his speech and that of his cohorts, not data-gathering activities. Consequently, this is not a case in which the plaintiff has "left somewhat unclear the precise connection between" the action or policy complained of and the chill alleged, as was the case in

> *Laird*. The *Laird* Court's concern regarding a significant attenuation between the action or policy complained of and the chill alleged does not apply here.

507 F.3d at 503-04 (emphasis in original) (citations omitted).

The court then remanded the case to determine if the Plaintiff's chill was objectively reasonable, offering an "objectively reasonable" test that it borrowed from First Amendment retaliation claims jurisprudence. "We further hold that to establish such a claim, a plaintiff must show that the defendant's actions or policy would deter a person of ordinary firmness from exercising his or her First Amendment liberties in the way that the plaintiff alleges he or she would have, were it not for the defendant's conduct or policy." *Id*. at 506.

One judge dissented, stating "we cannot find a school district constitutionally liable for chilling student speech every time a student chooses caution over risking possible discipline." *Id*. at 507. The dissent then stated that nominal damages do not redress an injury of chilled speech.

The District then filed a petition for panel reconsideration and for en banc review. While this petition was pending, one of the judges – a district court judge sitting by designation – changed his mind, joined with the dissent, and an amended opinion was entered upholding the District Court's decision.

D. The Amended Sixth Circuit Opinion

In its new 2-1 decision, the Sixth Circuit held that Plaintiff did not have standing to challenge the School District's Speech Policies, as he did not suffer an injury-in-fact and that even if he did, a claim for nominal damages would not redress his injuries.

Relying on *Laird*, the court concluded that an allegation of a subjective chill is not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm. "[F]or purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." 521 F.3d at 609. "In order to have standing, therefore, a litigant alleging chill must still establish that a concrete harm – i.e., enforcement of a challenged statute – occurred or is imminent." *Id.* at 610 (citation omitted). The court then stated that Plaintiff could not point to any action by the Defendants indicating that if he were to speak, punishment would result.

> Morrison asks us, essentially, to find a justiciable injury where his own subjective apprehension counseled him to choose caution and where he assumed – solely on the basis of the Board's 2004-05 policies and without any specific action by the Board – that were he to speak, punishment would result. . . . Morrison cannot point to anything beyond his own subjective apprehension and a personal (self-imposed) unwillingness to communicate, and those allegations of chill,

> without more, fail to substantiate an injury-in-fact for standing purposes.

521 F.3d at 610.[4]

The Sixth Circuit then went on to hold, as a second basis for its ruling, that nominal damages would not redress any injury Morrison suffered. In essence, the court held that a request for nominal damages could not by itself keep a case alive. In support of this proposition, the Sixth Circuit cited an opinion suggesting that nominal damages could not defeat a claim of mootness. *Id.* at 610-11 (citing *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1267-68 (10th Cir. 2004) (McConnell, J., concurring). While the Sixth Circuit styled its ruling in terms of redressability and standing, the court in effect held that the case was moot because nominal damages would provide no relief cognizable under the redressability element of Article III standing. *See id.* at 622 ("I believe that a concern with mootness rather than redressability animates the majority's opinion") (Moore, J., dissenting).

The dissent, consistent with the first panel opinion, distinguished *Laird* and stated that the Plaintiff had sufficiently alleged an injury-in-fact for

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[4] The court rejected the notion that Plaintiff had alleged an injury-in-fact even for his injunctive claims. "We make no distinction for standing purposes, therefore, between allegations of a past-experienced chill and allegations of chill seeking forward-looking relief. Without more, both will fail to constitute an injury-in-fact." *Id.* at 609 n.7.

chilled speech, and that an award of nominal damages would redress that violation. The dissent then took the majority to task for saying that a suit for nominal damages "trivializes the important business of the federal courts." The dissent stated that this minimizes "the federal courts' essential role in protecting free expression under the First Amendment . . . Far from dismissing the importance of free speech in the schools, the Supreme Court had admonished that '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* at 623 (citing *Keyishan v. Bd. Of Regents of Univ. of State of New York*, 385 U.S. 589 (1967)).

Both the Plaintiff and the ACLU Intervenors sought en banc review, which was denied.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the circuit split as to what constitutes an injury-in-fact when a person refrains from speaking out of fear of government reprisal. At least three circuits – the First, Second, and Eleventh – have held that a plaintiff suffers an injury-in-fact if he refrains from speaking due to an objectively reasonable fear that a government regulation forbids his speech. The divided Sixth Circuit decision in this case, however, requires more. To establish an injury-in-fact, the majority held, a plaintiff must show a "concrete act"

by the defendant beyond merely implementing a regulation that is targeted at the speech in question. *Morrison*, 521 F.3d at 608-10.

It has long been the rule of this Court that a plaintiff does not need to subject himself to punishment before he can challenge state action that specifically restricts speech. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Yet this is exactly what the Sixth Circuit's decision would require of a plaintiff: he must speak first to see if the government would punish him before he can seek redress in the courts. This Court's review is necessary to ensure uniformity among the circuits on the basic requirements for establishing Article III standing.

This Court should also grant certiorari because the Sixth Circuit's decision sharply departs from the previously well-established principle that a request for nominal damages to vindicate constitutional harm overcomes a claim of mootness, even where the challenged restriction has been cured. Instead, the Sixth Circuit held that nominal damages are incapable of redressing a past constitutional violation, rendering a case non-justiciable even if the plaintiff maintains a viable claim for nominal damages.

This decision not only cuts nominal damages from their constitutional and historical moorings, but also contravenes this Court's precedents and the

decisions of every other circuit to consider this issue.[5] The right to free expression is "of transcendent value to all society," *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), and nominal damages serve a critical role in protecting that right. In *Carey v. Piphus*, this Court held that a party is entitled to an award of nominal damages when a constitutional right is violated, regardless of whether it inflicted compensable injury, because of the "importance to organized society that those rights be scrupulously observed." 435 U.S. 247, 266 (1978).

The Sixth Circuit's disregard for these basic principles has far-reaching implications: the government is now free to violate constitutional rights with impunity, as long as it does not cause any economic harm and it cures the constitutional defect before a court can enter judgment against it. This severely limits a plaintiff's ability to vindicate a constitutional violation, merely because the harm it caused cannot be quantified in economic terms.

This decision reflects a growing trend among lower court judges viewing nominal damages not as an important tool to vindicate constitutional rights, but rather as a meaningless fiction that "trivializes

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[5] *See, e.g., Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *Ward v. Santa Fe Indep. Sch. Dist.*, 35 Fed.Appx. 386 (5th Cir. 2002); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983).

the important business of the federal courts." *Morrison*, 521 F.3d at 611; *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (McConnell, J., concurring); *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, J., concurring and dissenting). Ironically, however, adopting this view would actually increase needless litigation. Plaintiffs in constitutional cases would be forced to litigate claims of minimal compensatory damages that they may not otherwise have sought. Where such damages are not available, this view would make it easier for the government to render a case moot in the advanced stages of litigation. This would often prove more wasteful than frugal, potentially rendering years of judicial work on a case meaningless.

"The entire area of justiciability is a morass that confuses more than it clarifies." Chemerinsky, Erwin, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677 (1990). For three decades prior to this case, however, the principle that nominal damages can sustain the justiciability of an otherwise moot case had been a rare beacon of clarity among the circuits. The Sixth Circuit's decision marks a profound break from these precedents, seriously jeopardizing individuals' ability to vindicate their constitutional rights. As such, this case presents this Court a much-needed opportunity to provide clarity and finality on an issue of fundamental importance. Certiorari should be granted.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE SECOND AND ELEVENTH CIRCUITS AS TO WHETHER A DETERRENCE OF SPEECH PURSUANT TO A POLICY THAT SPECIFICALLY RESTRICTS SPEECH CONSTITUTES AN INJURY-IN-FACT.

It is well settled that a plaintiff does not have to be punished before challenging state action that threatens to restrict and thereby suppresses his speech. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (stating that where plaintiff was twice warned to stop handbilling or else face arrest, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). It is also well-settled law that a plaintiff has not suffered an injury-in-fact based purely on a subjective self-chilling of his speech where there is no actual state restriction on speech. *See Laird v. Tatum*, 408 U.S. 1, 3 (1972) (a party has not suffered an injury-in-fact when he chills his speech due to only the existence and operation of the Army's intelligence gathering and distributing system).

In the present case, Plaintiff faced an express prohibition on speech that created a genuine threat of enforcement. The Sixth Circuit nevertheless invoked *Laird*, rather than *Steffel*, as governing this case. That ruling conflicts with the decisions of this Court and at least three other circuits.

Laird arose when the Army implemented a data-gathering system to help prepare the Army to effectively assist local authorities in quelling domestic violence. *Id.* at 5. The system allegedly included surveillance of "lawful and peaceful civilian political activity." *Id.* at 2. The plaintiffs challenged its constitutionality, claiming that the surveillance chilled their constitutionally-protected speech. *Id.* at 10.

This Court framed the question as follows:

> [W]hether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose[?]

Id.

In response, the Court explained that even laws that are not a "direct prohibition" on First Amendment rights can create an injury-in-fact by their chilling effect. *Id.* (listing cases). Such laws must be "regulatory, proscriptive, or compulsory in nature," and the plaintiff must be "either presently or prospectively subject to the regulation." *Id.* at 11. But if the chilling effect is entirely subjective, then it is not enough to create an injury-in-fact.

The *Laird* plaintiffs fell into this latter category. The Army's surveillance policy did not regulate

speech in any way. The "chill" on their speech arose from their "speculative apprehensiveness that the Army may at some future date misuse the information [obtained in surveillance] in some way that would cause [them] direct harm." *Id.* at 13.

Steffel represents the opposite scenario. There, the plaintiff was part of a group distributing anti-Vietnam War literature on the sidewalks around a Georgia mall. The police threatened arrest if they did not stop, and they complied. A few days later, the plaintiff and a companion returned to distribute the literature again. The police again threatened them with arrest. Plaintiff left. His companion refused, and was arrested. Because the threat of arrest was not "imaginary or speculative," the Court held that the plaintiff suffered an injury-in-fact and did not need to expose himself to actual arrest or prosecution to be entitled to challenge state action that deterred the exercise of his constitutional rights. *Steffel,* 415 U.S. at 459.

In this case, the court of appeals held that Morrison did not suffer an injury-in-fact, even though the School had adopted policies that specifically restricted the speech he wished to engage in. Citing *Laird*, it required Morrison to prove *something more* – a "concrete act" by Defendants beyond implementing policies that directly targeted student speech. 521

F.3d at 608-10.[6] By so holding, the Sixth Circuit rendered an opinion that conflicts with *Steffel* and with opinions from the First, Second and Eleventh Circuits.

A. Conflict with the First Circuit

In *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F.3d 26 (1st Cir. 1999), an association of realtors brought suit challenging Rhode Island's Access to Public Records Act that prohibited the use of public records obtained through the Act for commercial purposes. The association wanted to use data it collected under the Act to recruit new members. Although the Act was never enforced against the association, it refrained from using the data fearing prosecution under the statute.

In analyzing whether the association had suffered an injury-in-fact based on their suppression of their speech, the court cited both *Laird* and *Steffel*. The court stated, "a private party need not 'first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.'" *Id.* at 30 (citing *Steffel*, 415 U.S. at 459). The court added, "the

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[6] The Court listed as specific examples (1) the "issuance of a temporary restraining order," (2) an "eight-month investigation into the activities and beliefs of the plaintiffs" by the government, and (3) "numerous alleged seizures of membership lists and other property belonging to the plaintiffs." 521 F.3d at 609 (citations omitted).

threat, however, must be credible. Therein lies the rub." *Id.* The court noted that in practice, "it is often difficult to distinguish between fears that are chimerical and those that are realistic." *Id.* at 31 (citing *Laird*, 408 U.S. at 13-14.) "Determining objective reasonableness demands a frank consideration of the totality of the circumstances, including the nature of the conduct that a particular statute proscribes." *Id.*

The court then adopted a standard for determining whether a fear of prosecution is objectively reasonable. The court held:

> when dealing with pre-enforcement challenges to recently enacted . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.

Id. The court then held that the association had indeed suffered an injury-in-fact and had standing to challenge the Act.

Applying the First Circuit standard to the case at bar would have yielded an entirely different result. The challenged Speech Policies were recently enacted by the District. The Speech Policies facially restricted speech. The speech restrictions were aimed at students, of which Plaintiff was one. In these situations, according to the First Circuit, a credible threat of prosecution should be assumed absent compelling evidence to the contrary.

B. Conflict with the Second Circuit

The Second Circuit, on at least two occasions, has held that a person suffered an injury-in-fact when he suppressed his speech pursuant to a statute that could reasonably be read to prohibit his speech. Nothing more needed to be shown.

In *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000), a nonprofit corporation challenged three Vermont statutes that regulated political advertisements. Although never charged with violating any of these statutes, the plaintiff claimed that its speech was barred by the statutes, and that "it would cease publishing non-compliant 'issue advocacy' communications unless and until the provisions were declared unconstitutional and the threat to it of civil sanctions . . . was thereby removed." *Id.* at 381.

The defendant challenged the plaintiff's standing as the statutes had never been enforced against the plaintiff. The court noted that "a plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has 'an actual and well-founded fear that the law will be enforced against' it." *Id.* at 382. It then turned its focus on whether the threat that the law would be enforced against the plaintiff was "credible." *Id.* After considering both parties' interpretation of the statute, the court concluded that "while there may be other, perhaps even better [interpretations],

[plaintiff's] is reasonable enough that it may legitimately fear that it will face enforcement of the statute by the State. . . ." *Id.* at 383.

Interestingly, the defendant argued that the statute did not even apply to plaintiff's speech, and that it did not intend to enforce the statute against the plaintiff. The court said that did not matter: "while that may be so, there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation." *Id.* at 383.

American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003), involved a Vermont statute prohibiting the sale and distribution of certain pornographic materials harmful to minors. The plaintiff was a bookstore that provided sexually-related material to persons with disabilities and certain illnesses. It claimed the law unconstitutionally restricted its ability to provide material to adults on the internet or through email.

The defendant unsuccessfully argued that the plaintiff lacked standing because the statute did not reach material posted on the plaintiff's websites. The court stated that the terms of the statutes in question "can be easily read to apply to material placed on a website or shared with an email or internet discussion group" and thus presented the plaintiff with the choice of risking prosecution or censoring the content of their sites. *Id.* at 100. The court concluded that the plaintiff "therefore met the threshold for establishing

standing for a First Amendment claim by demonstrating 'an actual and well-founded fear that the law will be enforced against [it].'" *Id.* at 101.

Thus, had the present case arisen in the Second Circuit, Plaintiff would have standing to challenge the Defendant's policies. He desired to share his beliefs with his peers that homosexual behavior was wrong, and the Defendant's policies unequivocally prohibited such speech. *See, e.g., Morrison*, 521 F.3d at 606 (school training explaining to students that "You can't avoid meeting people that you believe are wrong. . . . Just because you believe that does not give you permission to say anything about it."); *see also id.* (school policy defined prohibited harassment to include "language . . . commonly understood to convey . . . prejudice or [having] the effect of insulting or stigmatizing an individual"); *see also* Defendant's Answer, ¶ 3 (admitting the allegations in paragraph 3 of the Complaint ("School District policies and practice prohibit students from telling someone who is a homosexual that they believe homosexuality is wrong.")); ¶ 9 (admitting the allegations in paragraph 19 of the Complaint ("This training states that School District policy prohibits any student from telling another student that they believe homosexuality is "wrong" or contrary to their values or beliefs.")).

Plaintiff's interpretation of these policies "is reasonable enough" that he "legitimately fear[ed]" his speech would violate these policies. *Vermont Right to Life Committee*, 221 F.3d at 381. This is enough to establish an injury-in-fact, even when the Defendant

did not enforce the policies and argued that they did not apply to Plaintiff's speech. *See id.* at 383 (rejecting identical arguments). Thus, the court of appeal's decision in this case is in clear conflict with the rule in the Second Circuit.

C. Conflict with the Eleventh Circuit

In *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001), the Christian Coalition of Alabama and three judicial candidates sought to enjoin the enforcement of an advisory opinion promulgated by the Alabama Judicial Inquiry Commission ("JIC"). The Christian Coalition wanted to publish a voter guide that reported the responses of the different judicial candidates. The JIC issued an advisory opinion stating that some of the questions violated certain provisions of the Canons of Judicial Ethics. (The JIC is the body vested by the Alabama Constitution with authority to enforce the Canons of Judicial Ethics against Alabama judges). The JIC concluded that the judicial candidates should not respond to any of these questions. And in fact, after the JIC issued its advisory opinion, the judicial candidates did not specifically respond to the questions identified in the advisory opinion.

The JIC sought to dismiss the complaint, arguing that the plaintiffs lacked standing because it had only issued an opinion, and that there was no threat of imminent enforcement. The court began its standing analysis by describing the injury as "self-censorship."

The court stated, "we have recognized on several occasions that the chilling effect on speech and resulting self-censorship are types of injuries which may suffice for standing purposes." *Id.* at 1283. "Plaintiffs do not have to expose themselves to enforcement in order to challenge a law. Rather, an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. In such an instance, which is what is alleged here, the injury is self-censorship." *Id.*

The court then concluded that the plaintiffs made a sufficient showing that their First Amendment rights were chilled as a result of the JIC's advisory opinion.

> We conclude that the chill resulting from the JIC's advisory opinion satisfied the injury in fact requirement and was objectively reasonable because the advisory opinion created a sufficiently credible threat of prosecution.

Id. at 1284.[7]

Thus, like the First and Second Circuits, the Eleventh Circuit has held that when a plaintiff refrains from speech that is reasonably understood as being prohibited by a government regulation, the

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[7] The court specifically rejected the argument that any chill was caused by the Judicial Canons of Ethics. The sole focus of the court was whether the advisory opinion in and of itself created a chill on speech. *Id.* at 1284.

plaintiff has suffered an injury-in-fact. No further state action is required. This conflict among the circuits creates a stark disparity in who may access the courts to challenge the constitutionality of regulations that fairly may be read to forbid, and thus deter, protected expression, warranting resolution by this Court.

II. THE SIXTH CIRCUIT'S DECISION CONTRADICTS THE CLEAR TEACHINGS OF THIS COURT'S NOMINAL DAMAGES CASES AND CONFLICTS WITH EVERY OTHER CIRCUIT THAT HAS CONSIDERED THIS ISSUE.

Under 42 U.S.C. § 1983, damages are awarded for constitutional violations according to principles derived from the common law of torts. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 253 (1978). Tort law is primarily designed to compensate victims for injuries caused by the breach of recognized legal duties. *Id.* at 254. But common-law courts also "traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Id.* at 266. Thus, when "absolute" rights are involved, nominal damages serve a function that is entirely distinct from compensatory damages. They allow plaintiffs to sue solely "to obtain a ruling by a court that the defendant's conduct was tortious." Restatement (Second) of Torts § 907 cmt. b (1977).

In *Carey*, this Court held that plaintiffs who were deprived of their right to procedural due process were entitled to nominal damages, even if they could not prove actual injury. 435 U.S. at 266-67. The Court viewed a violation of a constitutional right as analogous not to ordinary torts, but to torts of the "absolute" kind. *Id.* at 266. Because of the "importance to organized society that those rights be scrupulously observed," the ruling ensured that an intrusion onto a constitutional right remained actionable regardless of whether it inflicted compensable injury. *Id.*

This Court's opinions since *Carey* are consistent with the notion that nominal damages can sustain justiciability in an otherwise moot case. It is well-established that a case is moot when "the issues presented are no longer 'live or the parties lack a legally cognizable interest in the outcome.'" *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). But this Court has explained that "even an award of nominal damages suffices" to constitute "relief on the merits" and create a "material alteration of the legal relationship of the parties." *Buckhannon Bd. and Care Home, Inc. v. W.V. Dept. of Health and Human Resources*, 532 U.S. 598, 604-05 (2001) (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)); *see also Farrar v. Hobby*, 506 U.S. 103, 115 (1992) ("As we have held, a nominal damages award . . . render[s] a plaintiff a prevailing party by allowing him to vindicate his 'absolute' right to procedural due process through

enforcement of a judgment against the defendant."); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 208 n.11 (1986) (explaining that nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury").

The courts of appeals overwhelmingly agree. In the ensuing decades following *Carey* – at least prior to this case – they have consistently found that a claim for nominal damages to vindicate a constitutional harm is enough to sustain justiciability. *See, e.g., Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004) (explaining that the Tenth Circuit has "squarely h[e]ld that a claim for nominal damages is sufficient to render a case justiciable"); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) (holding that the plaintiff's "claims for prospective relief are moot," but that "her possible entitlement to nominal damages creates a continuing live controversy"); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (explaining that to avoid mootness in a 42 U.S.C. § 1983 case, "it is enough that the parties merely request nominal damages"); *Ward v. Santa Fe Indep. Sch. Dist.*, 35 Fed.Appx. 386 (5th Cir. 2002) (finding that *Carey* "necessarily implied that a case is not moot so long as the plaintiff seeks to vindicate his constitutional rights through a claim for nominal damages"); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983) (rejecting district court's suggestion that due process claims were moot, explaining

that *Carey* "made it plain that the deprivation of procedural due process creates an independent right to seek, at a minimum, nominal damages"); *see also* 13A Charles Alan Wright, et al., Federal Practice and Procedure § 3533.3 at 266 (2d ed. 1984) ("A valid claim for nominal damages should avoid mootness.").[8]

Recently, however, Judge McConnell of the Tenth Circuit challenged this firmly-entrenched principle in a separate concurrence in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004). There, an animal rights group applied to Salt Lake City for a permit to demonstrate on public property during the 2002 Winter Olympics. *Id.* at 1250. After an eight-month delay, the City denied the initial application but awarded the group permits to demonstrate at four locations during the Olympics. *Id.* The group sued, claiming that the slow pace of the permit process violated the First Amendment. *Id.*

The City amended the challenged ordinance to cure the alleged defect in the challenged scheme, and then sought to dismiss the case as moot. *Id.* at 1256. With the Olympics already past and the ordinance

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[8] The Seventh Circuit, in an opinion released just months after *Carey*, suggested that nominal damages may not be sufficient to maintain justiciability. *Lister v. Lucey*, 575 F.2d 1325, 1336 (7th Cir. 1978). But it has held otherwise in more recent opinions. *See, e.g., Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004) (affirming district court judgment awarding nominal damages in a First Amendment case, even though the offending regulation had been withdrawn).

amended, the claim for injunctive relief was moot. *Id.* at 1257. The group further conceded that it had not suffered any compensable injury. *Id.* at 1256. But it also had a claim for nominal damages, which the court held was sufficient to maintain a live controversy and overcome the claim of mootness. *Id.* at 1257.

Constrained by binding precedent, Judge McConnell wrote the majority opinion, but he strongly critiqued that precedent in a concurring opinion. *Id.* at 1262-63 (McConnell, J., concurring). Nominal damages, he argued, "serve essentially the same function as declaratory judgments." *Id.* at 1265. After the City amended the ordinance, awarding nominal damages "would serve no practical purpose, would have no effect on the legal rights of the parties, and would have no effect on the future." *Id.* Under those circumstances, Judge McConnell urges nominal damages are insufficient to sustain justiciability.

Judge Jacobs echoed this view in a separate concurrence in *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007). In that case, students challenged a university policy that limited the student newspapers' ability to publish endorsements for candidates running for student government positions. *Id.* at 115. One newspaper impermissibly endorsed a slate of candidates, and in response, the school nullified the election and conducted a new one. *Id.* at 117. This nullification, the court held, created an unconstitutional chilling effect by prompting the newspaper to scale back its coverage of future elections. *Id.* at 128.

After the lawsuit was filed, the school revoked the challenged rule. *Id.* at 120. This mooted the students' claim for declaratory and injunctive relief, leaving them with only a claim for nominal damages. *Id.* at 135 n.17. The majority nonetheless reached the merits of the case, ruling in the students' favor and remanding the case on the issue of qualified immunity. *Id.* at 135.

Judge Jacobs dissented, offering a more pointed version of Judge McConnell's argument in *Utah Animal Rights Coalition*. Because the only remaining relief available was nominal damages, he believed it was "a case about nothing," and certainly not something "that should occupy the mind of a person who has anything consequential to do." *Id.* at 136; *see also Amato v. City of Saratoga Springs*, 170 F.3d 311, 322-23 (2d Cir. 1999) (Jacobs, J., concurring).

In this case, a sharply divided Sixth Circuit panel dispensed with more than two decades of its own precedent[9] and adopted Judge McConnell's view in its entirety – indeed, it cites no other authority to

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[9] *See, e.g., Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005); *Lynch v. Leis*, 382 F.3d 642, 646 n.2 (6th Cir. 2003); *Franklin v. Aycock*, 795 F.2d 1253, 1265 (6th Cir. 1986); *Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981). Judge McConnell even acknowledged that his view is not good law in the Sixth Circuit. *Utah Animal Rights Coal.*, 371 F.3d at 1268 (McConnell, J., concurring) ("The Sixth and Ninth Circuits, like ours, squarely hold that a claim for nominal damages is sufficient to render a case justiciable.") (citations omitted).

support its position. The majority describes nominal damages as "a vehicle for a declaratory judgment" that provides effectual relief "only with respect to future dealings between the parties." *Morrison*, 521 F.3d at 610-11 (quoting *Utah Animal Rights Coal.*, 371 F.3d at 1276-77 (McConnell, J., concurring)).[10]

This holding runs counter to this Court's precedent in two fundamental respects. First, its holding is premised on the erroneous view that nominal damages "have only declaratory effect and do not otherwise alter the legal rights or obligations of the parties." *Morrison*, 521 F.3d at 610 (quoting *Utah Animal Rights Coal.*, 371 F.3d at 1267-68 (McConnell, J., concurring)). Judge McConnell explained that, in his view, "[n]ominal damages awards serve essentially the same functions as declaratory judgments," and therefore can only provide effectual relief if they alter "future dealings between the parties." 371 F.3d at 1267-68.

But nominal damages and declaratory judgments are not analogous in this way. As the Tenth Circuit has acknowledged, "a declaratory judgment is generally

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[10] Other courts are taking notice. For example, a federal court in Wisconsin recently dismissed as moot an Establishment Clause challenge to a Nativity display erected at the Green Bay City Hall, despite the plaintiffs' request for nominal damages. *Freedom from Religion Foundation, Inc. v. City of Green Bay*, ___ F. Supp. 2d ___, 2008 WL 4516853 (E.D. Wis. Oct. 7, 2008). The court leaned heavily on the Sixth Circuit's decision in this case. *Id.* at *10.

prospective relief." *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1203 n.2 (10th Cir. 2002). It "permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty." 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2751 (2008). An award of nominal damages, by contrast, is retrospective relief. It allows a civil rights plaintiff to "vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

There are times, of course, where a plaintiff asks a court to declare that past governmental conduct violated a constitutional right. And when such a declaration would not alter the defendant's future conduct in any way, that claim is moot: "At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant." *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988).

As *Rhodes* suggests, the payment of damages – even a nominal amount – *always* alters the defendant's future conduct and the legal relationship between the parties "by forcing the defendant to pay an amount of money he would otherwise not pay." *Farrar*, 506 U.S. at 113; *see also id.* at 116-17 (O'Connor, J., concurring) ("One dollar is not exactly a bonanza, but it constitutes relief on the merits. And it

affects the defendant's behavior toward the plaintiff if only by forcing him to pay one dollar – something he would not otherwise have done.").

In this regard, nominal damages are no different than compensatory damages. They are awarded for different *purposes*, but they have the same *effect* on parties' legal rights and obligations: "A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he would otherwise not pay." *Id.* at 113. As such, a claim for nominal damages is sufficient to sustain justiciability.

Second, as the dissent in the Sixth Circuit's opinion in this case explains, "the majority's peevish sense that the instant action is a waste of the federal courts' time minimizes federal courts' essential role in protecting free expression under the First Amendment" and undermines the fundamental purpose of awarding nominal damages. 521 F.3d at 623 (Moore, J., dissenting).

The right to free expression is "of transcendent value to all society." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). And the loss of that freedom, "even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). But the Sixth Circuit's majority's

reasoning in this case threatens to leave unvindicated this invaluable right simply because its loss may be difficult to measure in economic value. When someone is deprived of a chance to express his political view, for example, "it is facile to suggest that no damage is done." *Memphis Cmty. Sch. Dist.*, 477 U.S. at 315 (Brennan, J., concurring) (quotation marks and citation omitted). "Loss of such an opportunity constitutes loss of First Amendment rights in their most pristine and classic form" – even if it does not result in financial loss. *Id.* (citation omitted). Yet, under the Sixth Circuit's holding, a plaintiff has no way of vindicating that loss unless he can prove that he will likely be harmed *again* in the future.

Nominal damages serve a critical function in such cases as "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist.*, 477 U.S. at 308. This may be only a "symbolic vindication," *see Floyd v. Laws*, 929 F.2d 1390, 1403 (9th Cir. 1991), but that does not diminish its inherent value. "Nominal relief does not necessarily a nominal victory make." 506 U.S. at 121 (O'Connor, concurring). Indeed, as this Court has explained, "[b]y making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266. The Sixth Circuit's rejection of this bedrock principle represents a sharp – and dangerous

– departure from the federal courts' traditional role of jealously guarding fundamental rights.

This protection is particularly important in cases, like this one, that arise in public schools. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 603 (1967) (citation omitted). Graduation-triggered mootness is a common phenomenon in the often multi-year cases students must pursue to vindicate their constitutional rights. *See, e.g., Bd. of Sch. Comm'rs of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (per curiam). And it is common that First Amendment claims are not attached to any financial loss that would provide for compensatory damages. This leaves nominal damages as often the *only* mechanism to ensure that school officials' unconstitutional actions do not evade judicial review.

Judge McConnell rejected the traditional view of nominal damages, in part, out of concern for judicial economy. A plaintiff could always append a claim for nominal damages, the argument goes, and "insulate the case from the possibility of mootness." *Utah Animal Rights Coal.*, 371 F.3d at 1266 (McConnell, J., concurring). But for decades, the courts of appeal have widely held that a claim for nominal damages will overcome a claim of mootness. This has not led to the waves of constitutional litigation that Judge McConnell apparently fears. Moreover, there are many instances in which cases can become moot in

constitutional matters: "[W]hen the cause of action does not survive (privacy claims, defamation), a plaintiff's death would moot the case. A defendant could also simply *pay* the nominal damages, thereby mooting the case." *Id.* at 1273 (Henry, J., concurring). And many government officials and entities are given immunity from claims for damages, making an award of nominal damages in those cases impossible. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 314-15 (1975) (qualified immunity shields public officials from awards for damages).

This rule could actually have the opposite effect and unnecessarily drain more judicial resources. It would require plaintiffs in constitutional cases to seek – and force the parties to litigate over – an award of minimal compensatory damages. And, where such damages are unavailable, this rule makes it easier for defendants to render a case moot in the advanced stages of litigation. This could "prove more wasteful than frugal," rendering years of judicial work on a case meaningless and possibly requiring the same issue to be litigated again in the future. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 192 (2000).

CONCLUSION

The Sixth Circuit's ruling greatly undermines free speech protections – a matter that is by no means "trivial," as expressed by the Sixth Circuit. What should be "vigilantly protected" has been severely wounded. Due to the Sixth Circuit's misapplication of this Court's precedent regarding when self-restraint on speech constitutes an injury-in-fact, citizens within the Sixth Circuit have less access to the courts to protect their free speech rights than those in other circuits. Persons within the Sixth Circuit should not be required to subject themselves to punishment before they can challenge a government policy that specifically restricts speech. This Court should grant certiorari on this issue to ensure that all persons have equal access to the federal courts to protect their right to free speech.

In addition, plaintiffs have long been able to obtain nominal damages to vindicate the loss of their constitutional rights. This has been the ruling of this Court since *Carey v. Piphus*, and every single circuit to address the issue. Yet the Sixth Circuit's opinion threatens to undermine the crucial role that nominal

damages play in protecting constitutional rights. This Court should grant certiorari to resolve these important issues.

Respectfully submitted,

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521 F.3d 602

United States Court of Appeals, Sixth Circuit.

Timothy MORRISON et al., Plaintiffs-Appellants (06-5380; 06-5406)/Cross-Appellees,

v.

BOARD OF EDUCATION OF BOYD COUNTY, Defendant-Appellee,

William Carter et al., Intervenors-Defendants-Appellees/Cross-Appellants (06-5407).

Nos. 06-5380, 06-5406, 06-5407.

Argued: July 25, 2007.
Decided and Filed: April 9, 2008.
Rehearing and Rehearing
En Banc Denied Aug. 27, 2008.*

ARGUED: Joel L. Oster, Alliance Defense Fund, Leawood, Kansas, for Plaintiffs. Winter R. Huff, Law Offices of John G. Prather, Somerset, Kentucky, for Defendants. Sharon McGowan, American Civil Liberties Union, New York, New York, for Intervenors. **ON BRIEF:** Joel L. Oster, Kevin H. Theriot, Alliance Defense Fund, Leawood, Kansas, Benjamin W. Bull, Gary McCaleb, Alliance Defense Fund, Scottsdale, Arizona, for Plaintiffs. Winter R. Huff, LAW Offices of John G. Prather, Somerset, Kentucky, Kimberly S. McCann, VanAntwerp, Monge, Jones & Edwards, LLP, Ashland, Kentucky, for Defendants. Sharon McGowan, Kenneth Y. Choe, American Civil Liberties

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* Judge Moore would grant rehearing for the reasons stated in her dissent.

Union, New York, New York, David A. Friedman, Fernandez, Friedman, Haynes & Kohn, Louisville, Kentucky, for Intervenors.

Before: MOORE and COOK, Circuit Judges; and ADAMS, District Judge.[1]

COOK, J., delivered the opinion of the court, in which ADAMS, D. J., joined. MOORE, J. (pp. 611-25), delivered a separate dissenting opinion.

AMENDED OPINION

COOK, Circuit Judge.

This panel heard arguments in the matter before us on July 25, 2007, after which we filed an opinion, *Morrison v. Board of Education of Boyd County,* 507 F.3d 494 (6th Cir.2007), reversing the judgment of the district court and remanding for further proceedings. Subsequently, the Board of Education of Boyd County (the "Board") filed a petition for rehearing en banc. Review of the briefs and record counsels us to reconsider our previous holding, and as a result we vacate and amend Sections III and IV of the prior opinion. We now affirm the district court's decision and set forth our opinion, as amended, below.

In this appeal, Timothy Morrison ("Morrison") challenges the district court's grant of summary

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[1] The Honorable John R. Adams, United States District Judge for the Northern District of Ohio, sitting by designation.

judgment in favor of the Board. Morrison is a student at Boyd County High School ("BCHS"). He is a Christian who believes that homosexuality is a sin. He further believes that part of his responsibility as a Christian is to tell others when their conduct does not comport with his understanding of Christian morality. During the 2004-05 academic year, BCHS had a written policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation. Wary of potential punishment, Morrison remained silent with respect to his personal beliefs, but challenged in federal court the Board's right to stifle his speech.

After Morrison filed this lawsuit, the Board changed the BCHS policy, but Morrison's litigation did not end. We must now decide whether Morrison's claim for nominal damages premised upon a "chill" on his speech during the 2004-05 school year presents a justiciable controversy. We conclude that it does not, and accordingly AFFIRM the district court's grant of summary judgment to the Board.

I. BACKGROUND

A. Factual Background

In 2002, some students at BCHS petitioned to start a chapter of the Gay Straight Alliance ("GSA"). *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F.Supp.2d 667, 670 (E.D.Ky.2003). Their efforts were met with hostility, which was not very surprising given BCHS students'

history of intolerance toward homosexuality. *Id.* at 670-74. To quell the hostility, within two months of approving the GSA, the school banned the GSA, as well as purported to ban all other student organizations for the 2002-03 school year. *Id.* at 675.

In response, a group of students who had attempted to spearhead the GSA chapter and their parents sued the school district in federal court. After the district court issued a preliminary injunction requiring the school board to give the GSA chapter equal access to that afforded other student groups, *id.* at 693, the suit ended in a consent decree. One provision in the consent decree required the school district to adopt policies prohibiting harassment on the basis of actual or perceived sexual orientation, and to provide mandatory anti-harassment training to all students.

Prior to the 2004-05 school year, in attempting to comply with the consent decree, the school district adopted Policy 09.42811 as the district-wide anti-harassment policy. Policy 09.42811 prohibited "Harassment/Discrimination," which it defined as:

> unlawful behavior based on race, color, national origin, age, religion, sex [,] actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.

> The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process. . . .

Joint Appendix ("J.A.") at 120. BCHS's 2004-05 Code of Conduct repeated the first paragraph of Policy 09.42811, J.A. at 270 (BCHS Code at 3), but later stated:

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J.A. at 277 (BCHS Code at 16).

Additionally, the school district created two training videos – one for Boyd County Middle School ("BCMS") and one for BCHS – to fulfill the anti-harassment training provisions of the consent decree. As relevant here, the high school training video included a lengthy discussion of the ills of bullying and name-calling. The participants included a BCHS social studies teacher,[1] some students, an "ADL

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Facilitator,"[2] and a clinical psychologist. Additionally, *the BCHS training video contained a passage discussing* sexual orientation. Near the end of this passage, the clinical psychologist stated:

> .... We all get self-centered and start to think that our way is the right way and our way is the correct way. We all want to believe that we have evidence that our way is the correct way. . . .
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> So . . . no matter where you go, no matter what you do, no matter who you meet, you are going to find people that you don't like. You're going to find people that you disagree with. You're going to find people that you don't like the way they act. It can't be avoided, not, not anywhere in the world, it can't be avoided. You're going to find people that you believe are absolutely wrong. You're going to think[, "W]hat are they thinking? That, that is so wrong, it [']s obvious to everybody[." B]ut not to them. Because they believe you are wrong. You can't avoid meeting people that you believe are wrong. But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. *Just because you believe that does not give you permission to say anything*

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The new policies and the mandatory training sparked further acrimony in Boyd County. This time, some parents feared that the training would discourage, and the policies would prohibit, their children from speaking about their religious beliefs regarding homosexuality. Some parents withheld their children from the mandatory training. Eventually, a group of parents and students sued.

B. Procedural Background

On February 15, 2005, a group of plaintiffs[3] filed a complaint in the United States District Court for the Eastern District of Kentucky. They named the Board as the sole defendant and pursued claims under 42 U.S.C. § 1983 for violations of various constitutional rights, specifically, their rights to free speech (first cause of action), due process (second

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[3] The only plaintiff whose claim is relevant at this point of the litigation is Morrison. At the time the complaint was filed, Morrison was a student at BCHS. The other plaintiffs are his parents Timothy and Mary Morrison, Brian Nolen, and Debora Jones. Both Nolen and Jones are parents of students who attended BCMS at some time relevant to this case.

cause of action), equal protection (third cause of action), and free exercise of religion (fourth cause of action). The crux of the plaintiffs' complaint is that the speech codes in effect during the 2004-05 school year prevented students in Boyd County from voicing their convictions that homosexuality is sinful, and the speech codes and training together undermined their ability to practice their Christian faith. For these asserted violations, the plaintiffs sought declaratory relief, injunctive relief, actual damages, nominal damages, costs, and attorney fees.

On April 18, 2005, the district court permitted the plaintiffs from the earlier action to intervene. The intervenors filed their Answer in Intervention that day, denying that the plaintiffs suffered any constitutional violations.[4]

In August 2005, the Board revised its policy, as well as the BCMS and BCHS student codes of conduct. Under the revised codes, anti-homosexual speech would not be prohibited unless it was "sufficiently severe or pervasive that it adversely affects a student's education or creates a climate of hostility or intimidation for that student, both from the perspective of an objective educator and from the perspective of the student at whom the harassment is directed." J.A. at 655 (2005-06 BCHS Code of Conduct at 40); *accord* J.A. at 642 (2005-06 BCMS Discipline Code at

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16). Additionally, the BCHS Code of Conduct stated, "The civil exchange of opinions or debate does not constitute harassment. Students may not, however, engage in behavior that interferes with the rights of another student or materially and substantially disrupts the educational process." J.A. at 655 (2005-06 BCHS Code of Conduct at 40).

After these revisions, the parties filed cross-motions for summary judgment. On February 17, 2006, the district court issued its opinion and judgment granting the Board's motion and denying both the plaintiffs' and the intervenors' motions. Noting the changes made to the initially challenged policies, the district court indicated that it was "not inclined to adjudge the constitutionality of policies no longer in effect," and rejected all of the plaintiffs' challenges to the written policies on this basis. J.A. at 672 (Dist. Ct. Mem. Op. at 7). Additionally, the district court determined that Plaintiffs' claim for damages failed because "Plaintiffs were unable to specify the measure and amount of their alleged damages." J.A. at 680 (Dist. Ct. Mem. Op. at 15). The district court further stated that "even their request for nominal damages remains unsupported by any factual allegations," and that "Plaintiffs have made no specific plea" for damages incurred prior to the Board's change in policies. *Id.*

After the district court entered a corrected judgment for reasons not relevant to this appeal, both the plaintiffs and the intervenors timely appealed.

II. JURISDICTION

The district court had federal-question jurisdiction over this 42 U.S.C. § 1983 action. 28 U.S.C. § 1331. We have jurisdiction over the plaintiffs' appeal from an adverse final judgment. *Id.* § 1291.

III. ANALYSIS

"This is a case about nothing."[5] The course of federal litigation often involves a winnowing of issues. Where, as here, the process of separating wheat from chaff results in a threshing floor bare of justiciable claims, the case is over. For purposes of this appeal, the only remaining claim we need consider is Timothy Morrison's as-applied pre-enforcement challenge for nominal damages based on his allegations that the Board's policies during the 2004-05 school year "chilled" his speech. Because we conclude that Morrison lacks standing to pursue his claim of chilled speech, we affirm the district court's grant of summary judgment to the Board.

That a litigant must establish standing is a fundamental element in determining federal jurisdiction over a "case" or "controversy" as set forth in Article III of the Constitution. *E.g., Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) ("No principle is more fundamental to the

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[5] *Husain v. Springer,* 494 F.3d 108, 136 (2d Cir.2007) (Jacobs, C.J., concurring in part and dissenting in part).

judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976))). By now, it is axiomatic that a litigant demonstrates Article III standing by tracing a concrete and particularized injury to the defendant – whether actual or imminent – and establishing that a favorable judgment would provide redress. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For purposes of this appeal, we focus on whether Morrison's alleged chill constitutes an injury-in-fact and, if so, whether nominal damages would provide sufficient redress. We treat each element in turn.

A. Injury-in-Fact

To avoid conferring standing by way of guesswork, we require that a litigant demonstrate either a concrete harm or the threat of such harm.[6] *Laird v.*

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[6] We note that the defendant here is the *school district.* In *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court constrained municipal liability to occasions when local government bodies took actions "under color of some official policy" that resulted in the violation of a constitutional right. *Id.* at 692, 98 S.Ct. 2018; *see also Doe v. Claiborne County,* 103 F.3d 495, 508 (6th Cir.1996) ("In addition to showing that the School Board as an entity 'caused' the constitutional violation, plaintiff must also show a direct causal link between the custom and the constitutional deprivation. . . .").

(Continued on following page)

Tatum, 408 U.S. 1, 13, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972); *ACLU v. Nat'l Sec. Agency,* 493 F.3d 644, 660 (6th Cir.2007). With respect to the standing of First Amendment litigants, the Supreme Court is emphatic: "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird,* 408 U.S. at 13-14, 92 S.Ct. 2318; *see also Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (requiring a harm to be "distinct and palpable" for standing purposes). In *Laird,* the Court confronted the question of "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more,* of a governmental investigative and data-gathering activity." 408 U.S. at 10, 92 S.Ct. 2318 (emphasis added). As narrated by the Court, the injury-in-fact alleged by the *Laird* plaintiffs resulted from a confluence of subjective perceptions, beliefs, and apprehensions. *See id.* at 13, 92 S.Ct. 2318 (hypothesizing that the plaintiffs' alleged chill arose from their "very perception of the system as inappropriate to the Army's role," or "beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector," or "less generalized

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In assessing whether Morrison experienced imminent harm, therefore, we look not to the high school or any particular administrator – but rather, to the policy as articulated by the Board.

yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm"). Without more, the *Laird* Court deemed those allegations insufficient. *Id.* at 13-14, 92 S.Ct. 2318.

The question before us, then, is what "more" might be required to substantiate an otherwise-subjective allegation of chill,[7] such that a litigant would demonstrate a proper injury-in-fact? As might be expected, a variety of answers emerges across this court and our sister circuits. A non-exhaustive list includes the following: the issuance of a temporary

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[7] In the situation before us – an analysis of standing – any distinction between claims of past and future (i.e., forward-looking) chill lacks purpose. Although one of our sister circuits distinguishes the two, arguing that a chill is "not merely subjective" once it "has already been experienced," *Husain*, 494 F.3d at 128, we decline to understand the *Laird* Court's definition of "subjective" as temporally bound. *See Laird*, 408 U.S. at 11, 92 S.Ct. 2318 (finding no injury-in-fact where a chilling effect arose "merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual"); *see also* Oxford English Dictionary (2007) (defining "subjective" as "[r]elating to the thinking subject, proceeding from or taking place within the subject; having its source in the mind; . . . belonging to the conscious life"). Subjective emotions simply do not transform into objective facts – and thus a concrete injury – with the passage of time. We make no distinction for standing purposes, therefore, between allegations of a past-experienced chill and allegations of chill seeking forward-looking relief. Without more, both will fail to constitute an injury-in-fact.

restraining order, *County Sec. Agency v. Ohio Dep't of Commerce,* 296 F.3d 477, 482-83 (6th Cir.2002); *Howard Gault Co. v. Tex. Rural Legal Aid, Inc.,* 848 F.2d 544, 558 (5th Cir.1988); an eight-month investigation into the activities and beliefs of the plaintiffs by Department of Housing and Urban Development officials, *White v. Lee,* 227 F.3d 1214, 1226, 1228 (9th Cir.2000); and "numerous alleged seizures of membership lists and other property" belonging to the plaintiffs, *Nat'l Commodity and Barter Ass'n v. Archer,* 31 F.3d 1521, 1530 (10th Cir.1994). Even this abbreviated list confirms that for purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact.

Conversely, absent proof of a concrete harm, where a First Amendment plaintiff only alleges inhibition of speech, the federal courts routinely hold that no standing exists. *See, e.g., Grendell v. Ohio Supreme Court,* 252 F.3d 828, 834 (6th Cir.2001) ("[F]ears of prosecution cannot be merely 'imaginative or speculative.'" (quoting *Younger v. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971))); *Adult Video Ass'n v. U.S. Dep't of Justice,* 71 F.3d 563, 566 (6th Cir.1995) (same); *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d 1375, 1380 (D.C.Cir.1984) (distinguishing a chilling effect from "the immediate threat of concrete, harmful action").

Characterizing chill as insufficient to establish standing is not original to this panel. In *Adult Video Association v. United States Department of Justice,* 71

F.3d 563 (6th Cir.1995), we explained that First Amendment chill typically constitutes the "*reason* why the governmental imposition is invalid rather than . . . the harm which entitles [a party] to challenge it." *Id.* at 566 (quoting *United Presbyterian Church,* 738 F.2d at 1378). This understanding of chill comports with the underlying rationales of intersecting First Amendment doctrines. For example, the doctrine of overbreadth relies on a "chill" theory to permit a litigant – who *already has standing* by virtue of demonstrating a concrete harm – to challenge a rule that may only affect others. *See Midwest Media Prop., L.L.C. v. Symmes Twp.,* 503 F.3d 456, 463 (6th Cir.2007) ("[O]verbreadth does not excuse a party's failure to 'allege an injury arising from the specific rule being challenged. . . .'" (quoting *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 351 (6th Cir.2007))); *United Presbyterian Church,* 738 F.2d at 1379 ("It is only in this . . . respect that 'chilling effect' has anything to do with the doctrine of standing: It permits a person, who has standing to challenge governmental action because of the concrete harm it causes him, to assert a deficiency which may not affect him but only others."). In order to have standing, therefore, a litigant alleging chill must still establish that a concrete harm – i.e., enforcement of a challenged statute – occurred or is imminent. *See Am. Library Ass'n v. Barr,* 956 F.2d 1178, 1193 (D.C.Cir.1992) ("[W]hether plaintiffs have standing . . . depends on how likely it is that the government will attempt to use these provisions against them . . .

and not on how much the prospect of enforcement worries them.").

The claim at stake here involves Morrison's choice to chill his own speech based on his perception that he would be disciplined for speaking. But whether he would have been so punished, we can only speculate. The school district – again, the actual defendant here – stated that its former discipline policy regarding instances of harassment or discrimination "shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process." The record is silent as to whether the school district threatened to punish or would have punished Morrison for protected speech in violation of its policy. Morrison asks us, essentially, to find a justiciable injury where his own subjective apprehension counseled him to choose caution and where he assumed – solely on the basis of the Board's 2004-05 policies and without any specific action by the Board – that were he to speak, punishment would result. We decline to do so. Absent a concrete act on the part of the Board, Morrison's allegations fall squarely within the ambit of "subjective chill" that the Supreme Court definitively rejected for standing purposes. *Laird,* 408 U.S. at 13, 92 S.Ct. 2318 (quotation marks omitted). Morrison cannot point to anything beyond his own "subjective apprehension and a personal (self-imposed) unwillingness to communicate," *ACLU,* 493 F.3d at 662, and those allegations of chill, without more, fail

to substantiate an injury-in-fact for standing purposes.

B. Redressability

Though we determine that Morrison fails to state an injury-in-fact, we also comment on the second element of standing: whether nominal damages would redress Morrison's alleged injury. No readily apparent theory emerges as to how nominal damages might redress past chill. As Morrison's own counsel acknowledged at oral argument, nominal damages are a vehicle for a declaratory judgment. As such, nominal damages have "only declaratory effect and do not otherwise alter the legal rights or obligations of the parties. . . . [T]hey can sometimes constitute effectual relief, *but only with respect to future dealings* between the parties." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1267-68 (10th Cir.2004) (McConnell, J., concurring) (emphasis added). While we may have allowed a nominal-damages claim to go forward in an otherwise-moot case, *see Lynch v. Leis*, 382 F.3d 642, 646 n. 2 (6th Cir.2004); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir.1981), we are not required to relax the basic standing requirement that the relief sought must redress an actual injury.

In the situation before us, Morrison seeks nominal damages based on a regime no longer in existence. To confer nominal damages here would have *no* effect on the parties' legal rights. *See Utah Animal*

Rights, 371 F.3d at 1268 (McConnell, J., concurring) ("Where . . . the challenged past conduct *did not give rise to a compensable injury* and there is no realistic possibility of a recurrence, nominal damages have no more legal effect than would injunctive or declaratory relief in the same case.") (emphasis added). Because nominal damages will not provide Morrison any redress, his suit fails to satisfy the second requirement for standing.

This case should be over. Allowing it to proceed to determine the constitutionality of an abandoned policy – in the hope of awarding the plaintiff a single dollar – vindicates no interest and trivializes the important business of the federal courts.

IV. CONCLUSION

Morrison fails to demonstrate either a concrete harm or how a favorable judgment might redress his purported injury. As a result, he lacks standing and we affirm.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I find myself writing a dissent in this case upon the decision of the district judge sitting by designation to join with the former dissent and to grant panel rehearing. Adhering to the prior panel majority, I now dissent. I reiterate what I wrote as the former majority

opinion in the dissent that follows,[1] *see* 507 F.3d 494, 497 (6th Cir.2007), and I explain why the new majority is in error.

Timothy Morrison ("Morrison") was a student at Boyd County High School ("BCHS"). He is a Christian, and he believes that homosexuality is a sin. He further believes that part of his responsibility as a Christian is to tell others when their conduct does not comport with his understanding of Christian morality. During the 2004-05 academic year, BCHS had a written policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation. Morrison did not want to be punished, so he kept to himself his beliefs regarding homosexuality.

After Morrison filed this lawsuit, the Board of Education of Boyd County ("Board") changed the BCHS policy, but the litigation did not end. We must now decide whether Morrison's claim for nominal damages premised upon the "chill" on Morrison's speech during the 2004-05 school year presents a justiciable controversy. As before, I conclude that it does and accordingly would reverse the district court's grant of summary judgment to the school board on this claim. Because genuine issues of material fact prevent us from determining the merits of

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[1] I note that the new majority has liberally adopted my prior opinion for its Parts I and II.

Morrison's free-speech claim, I would remand the case to the district court for further proceedings.

I. BACKGROUND

A. Factual Background

In 2002, some students at BCHS petitioned to start a chapter of the Gay Straight Alliance ("GSA"). *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F.Supp.2d 667, 670 (E.D.Ky.2003). Their efforts were met with hostility, which was not very surprising given BCHS students' history of intolerance toward homosexuality. *Id.* at 670-74. To quell the hostility, within two months of approving the GSA, the school banned the GSA, as well as purported to ban all other student organizations for the 2002-03 school year. *Id.* at 675.

In response, a group of students who had attempted to spearhead the GSA chapter and their parents sued the school district in federal court. After the district court issued a preliminary injunction requiring the school board to give the GSA chapter equal access to that afforded other student groups, *id.* at 693, the suit ended in a consent decree. One provision in the consent decree required the school district to adopt policies prohibiting harassment on the basis of actual or perceived sexual orientation, and to provide mandatory anti-harassment training to all students.

Prior to the 2004-05 school year, in attempting to comply with the consent decree, the school district adopted Policy 09.42811 as the district-wide anti-harassment policy. Policy 09.42811 prohibited "Harassment/Discrimination," which it defined as

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for the Eastern District of Kentucky. They named the Board as the sole defendant and pursued claims under 42 U.S.C. § 1983 for violations of various constitutional rights, specifically, their rights to free speech (styled as the "FIRST CAUSE OF ACTION"), due process (second cause of action), equal protection (third cause of action), and free exercise of religion (fourth cause of action). The crux of the plaintiffs' complaint is that the speech codes in effect during the 2004-05 school year prevented students in Boyd County from speaking their convictions that homosexuality is sinful, and the speech codes and training together undermined their ability to practice their Christian faith. For these asserted violations, the plaintiffs sought declaratory relief, injunctive relief, actual damages, nominal damages, costs, and attorney fees.

On April 18, 2005, the district court permitted the plaintiffs from the earlier action to intervene. The intervenors filed their Answer in Intervention that day, denying that the plaintiffs had suffered any constitutional violations.[5]

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time the complaint was filed, Morrison was a student at BCHS. The other plaintiffs are his parents Timothy and Mary Morrison, Brian Nolen, and Debora Jones. Both Nolen and Jones are parents of students who attended Boyd County Middle School at some time relevant to this case.

[5] Later, the intervenors changed their position and argued that the 2004-05 BCHS speech code was unconstitutional.

In August 2005, the Board revised its policy, as well as the BCMS and BCHS student codes of conduct. Under the revised codes, anti-homosexual speech would not be prohibited unless it was "sufficiently severe or pervasive that it adversely affects a student's education or creates a climate of hostility or intimidation for that student, both from the perspective of an objective educator and from the perspective of the student at whom the harassment is directed." J.A. at 655 (2005-06 BCHS Code of Conduct at 40); *accord* J.A. at 642 (2005-06 BCMS Discipline Code at 16). Additionally, the BCHS Code of Conduct stated, "The civil exchange of opinions or debate does not constitute harassment. Students may not, however, engage in behavior that interferes with the rights of another student or materially and substantially disrupts the educational process." J.A. at 655 (2005-06 BCHS Code of Conduct at 40).

After these revisions, the parties filed cross-motions for summary judgment. On February 17, 2006, the district court issued its opinion and judgment granting the Board's motion and denying both the plaintiffs' and the intervenors' motions. Noting the changes that had been made to the policies that were initially challenged, the district court indicated that it was "not inclined to adjudge the constitutionality of policies no longer in effect," and rejected all of the plaintiffs' challenges to the written policies on this basis. J.A. at 672 (Dist. Ct. Mem. Op. at 7). Additionally, the district court determined that the plaintiffs' claim for damages failed because "Plaintiffs

were unable to specify the measure and amount of their alleged damages." J.A. at 680 (Dist. Ct. Mem. Op. at 15). The district court further stated that "even their request for nominal damages remains unsupported by any factual allegations," and that "Plaintiffs have made no specific plea" for damages incurred prior to the Board's change in policies. *Id.*

After the district court entered a corrected judgment for reasons not relevant to this appeal, both the plaintiffs and the intervenors timely appealed.

II. JURISDICTION

The district court had federal-question jurisdiction over this 42 U.S.C. § 1983 action. 28 U.S.C. § 1331. We have jurisdiction over the plaintiffs' appeal from an adverse final judgment. *Id.* § 1291.

III. ANALYSIS

Our initial task is to determine exactly which claims are, and which are not, presented in this appeal. First, the plaintiffs do not challenge the district court's rejection of their free-exercise claim, which we accordingly do not consider. Next, the district court concluded that once the school district had revised its policy in a fashion acceptable to the plaintiffs and intervenors, the plaintiffs' claims seeking forward-looking relief, i.e., declaratory and injunctive relief, became moot. The plaintiffs do not

challenge this conclusion on appeal, so we do not consider their claims seeking such relief.

The plaintiffs, however, also pursued claims for damages, both nominal and compensatory. On appeal, the plaintiffs pursue only their claim for nominal damages and seek to premise this claim on Timothy Morrison's (the BCHS student plaintiff's) "chilled" speech during the 2004-05 school year. Consequently, the only plaintiff who may have a live claim is Timothy Morrison. Accordingly, Morrison's free-speech claim seeking nominal damages is the only claim properly considered on appeal.[6]

A. Justiciability

1. Mootness

The district court concluded that, because the school district had changed its policy, the case was

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[6] The plaintiffs' briefs also press their equal-protection and due-process claims, but the arguments offered in support of their equal-protection theory are wholly duplicative of their free-speech arguments. The plaintiffs' due-process theory – that the 2004-05 speech code was unconstitutionally vague – similarly presents a First Amendment argument under a different label. Indeed, the primary case that the plaintiffs' brief cites in support of their due-process argument, *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir.2002), analyzed the plaintiff's void-for-vagueness theory as a First Amendment argument. *Id.* at 266-67. Because the plaintiffs' due-process and equal-protection arguments are essentially First Amendment arguments masquerading as Fourteenth Amendment arguments, we do not address them separately.

moot, notwithstanding Morrison's claim for nominal damages. It offered two reasons for this analysis: First, the district court said that the plaintiffs had never requested nominal damages specifically for the period preceding the Board's amendment of the offending policies. Second, the district court said that the plaintiffs failed to substantiate the nominal-damages claim with factual allegations.

I believe that the first reason is inaccurate, as the complaint clearly requests "an award of actual and nominal damages in an amount deemed appropriate by" the district court. J.A. at 34 (Compl. at 14, ¶ d.). Because the offending policy was in effect when the plaintiffs filed their complaint, their request for nominal damages could have addressed only the period preceding the Board's amendment.

The district court's second reason misapprehends the nature of nominal damages. Nominal damages are awarded when a plaintiff suffered a deprivation of a constitutional right, but the plaintiff lacks proof that he or she experienced an "actual injury" arising from that deprivation. *Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). We have recognized that nominal damages are appropriate when a plaintiff proves a constitutional violation but lacks proof of an actual injury. *Sutton v. Cleveland Bd. of Educ.,* 958 F.2d 1339, 1352 (6th Cir.1992) (procedural due-process claim; citing *Carey v. Piphus*).

Moreover, because nominal damages are a symbolic remedy for past wrongs, a prayer for nominal

damages precludes a finding of mootness, even when the defendant has altered or abandoned the allegedly unconstitutional policy forming the basis for the plaintiff's complaint. *Murray v. Bd. of Trs., Univ. of Louisville,* 659 F.2d 77, 79 (6th Cir.1981) (remanding First Amendment case to district court for adjudication of plaintiff's nominal-damage claim); *see also Blau v. Ft. Thomas Pub. Sch. Dist.,* 401 F.3d 381, 387 (6th Cir.2005) ("[T]he existence of a damages claim ensures that this dispute is a live one. . . ."); *id.* at 387-88 (citing cases); *Lynch v. Leis,* 382 F.3d 642, 646 n. 2 (6th Cir.2004) ("[A] claim for nominal damages . . . is normally sufficient to establish standing, defeat mootness, and grant prevailing party status. . . ."); *Utah Animal Rights Coal. v. Salt Lake City Corp.,* 371 F.3d 1248, 1257-58 (10th Cir.2004) (following Tenth Circuit precedent holding that claim for nominal damages is sufficient for justiciability); *id.* at 1268 (McConnell, J., concurring) (noting that the Sixth Circuit as well as the Ninth Circuit holds that a nominal-damages claim precludes mootness, but disagreeing with the rule); *id.* at 1275 (Henry, J., concurring) ("[T]he Supreme Court has directly and indirectly indicated that a claim for nominal damages in a constitutional case may vindicate rights that should be scrupulously observed, and hence, such a case is not, nor should it be, moot."). For these reasons, Morrison's nominal-damages claim is not moot.

2. Morrison's Standing

I next consider Morrison's standing to bring his nominal-damages claim. The key questions here are whether the "chill" on Morrison's speech constituted a sufficient injury to confer standing and whether the federal district court had the capacity to redress such a harm. In considering whether a case or controversy exists conferring subject-matter jurisdiction on our court, we must evaluate standing at the time the plaintiff filed his or her complaint and not at anytime thereafter. *Cleveland Branch, NAACP v. City of Parma,* 263 F.3d 513, 524-26 (6th Cir.2001). We have relied on Supreme Court precedent to explain the distinction between standing and mootness: "standing concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed,' . . . while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation." *Id.* at 525 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 184, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). Accordingly, we should not be concerned with whether the policy caused a past or future chill on Morrison's speech as judged from our current temporal vantage point but rather whether, at the time Morrison filed his complaint in February 2005

(prior to the August amendment of the BCHS speech policy), he possessed standing.[7]

To determine whether a chill on speech confers standing, we apply a three-part test. A plaintiff has constitutional standing when he or she can show: (1) an injury-in-fact that; (2) was "fairly traceable to the defendant's allegedly unlawful conduct"; and (3) is "likely to be redressed" via a favorable decision. *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 349 (6th Cir.2007) (quoting *Lujan v. Defenders of*

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[7] Concerns regarding "chilled" speech may take several forms. For example, the doctrine of overbreadth constitutes an exception to prudential standing requirements and permits a party with constitutional standing to raise First Amendment claims of third parties who are not present, but whose speech may be chilled in the future if the regulation stands. *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 349 (6th Cir.2007); *West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1367 (10th Cir.2000). Similarly, a statute may be void for vagueness if it would deter would-be speakers from speaking because they cannot tell whether their intended speech falls within the statute's prohibitions. *See, e.g., Reno v. ACLU,* 521 U.S. 844, 871-72, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("The vagueness of [a content-based speech] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (noting that a vague statute "operates to inhibit the exercise of [First Amendment] freedoms" (citation omitted)). Here, however, Morrison makes an as-applied rather than a facial challenge to the school district's speech code, focusing on the chilling effect the anti-harassment policy had on his speech. Morrison argues that he would have spoken during the 2004-05 school year, but that the speech code then in effect prevented him from doing so.

Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). I consider these parts in turn.

a. Injury-In-Fact

The Supreme Court has defined an "injury-in-fact" as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks and citations omitted).

I believe that Morrison has established a concrete, particularized, and actual injury. Morrison alleged in his complaint that "School District policies and practice prohibit students from speaking in a manner that has the effect of insulting or stigmatizing another." J.A. at 21 (Compl. at ¶ 2.) Morrison further alleged that "School district policies and practice prohibit students from telling someone who is a homosexual that they believe homosexuality is wrong." J.A. at 22 (Compl. at ¶ 3). Morrison's affidavit attached to his cross-motion for summary judgment stated that the school district's policies prohibited him from expressing "an ideological and a sincere religious belief that [he] must inform those that engage in destructive lifestyles, like homosexuality, that they are wrong." J.A. at 625 (Morrison Aff. at ¶ 5). There is nothing conjectural about the injury caused by a ban on constitutionally protected speech that carries the threat of punitive enforcement.

Our sister circuits have held, both implicitly and explicitly, that a chill on an individual's ability to exercise his or her right to free speech is a constitutional injury-in-fact. For instance, in *White v. Lee*, 227 F.3d 1214 (9th Cir.2000), the Ninth Circuit held that government officials' "eight-month investigation into the plaintiffs' [associational] activities and beliefs chilled the exercise of their First Amendment rights," which entitled the plaintiffs "to seek a remedy for this constitutional violation." *Id.* at 1226. Similarly, in *National Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521 (10th Cir.1994), the Tenth Circuit held that an organizational plaintiff could premise a *Bivens* claim seeking damages for a violation of First Amendment associational rights upon overzealous investigative procedures that had a chilling effect on its members' associational rights. *Id.* at 1530. The court implicitly concluded that a chill represents an injury-in-fact, stating that the plaintiffs could "establish their First Amendment claim" by "prov[ing] wrongful conduct by the defendant and that such conduct had a chilling effect on the plaintiffs' organizational activities and associational rights." *Id.* at 1531 n. 4.

Additionally, in *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir.1988), the Fifth Circuit suggested, if not implicitly held, that chilled speech constitutes an injury-infact [sic]. There, the court sustained an award of damages to compensate a plaintiff "for whatever injuries [he] may have suffered to his reputation and from the chilling effect the TRO had on the exercise of his First Amendment rights."

Id. at 557. And more recently, the Second Circuit joined this chorus with its opinion in *Husain v. Springer,* 494 F.3d 108 (2d Cir.2007). In *Husain,* a group of college-student journalists sued, claiming that the college president violated their First Amendment rights by nullifying the results of, and rescheduling, a student-government election in response to a hyper-partisan issue of a college newspaper. They sought nominal damages and premised this First Amendment claim upon chilled speech, specifically, the paper's subsequent reduction in election coverage out of fear that favorable coverage would lead to the disqualification of a candidate. *See id.* at 119 (noting that "the *College Voice* editors decided to give their endorsement of [a student party running the subsequent school year] less prominence" as a result of the election nullification). Even though the results of the nullified election and the subsequent election were identical, the court held that the "chilling effect" upon the paper's coverage "g[ave] rise to a First Amendment injury." *Id.* at 128; *see also id.* (concluding that the election nullification "violated the plaintiffs' First Amendment rights as a result of the chill on student speech that it created"). Each of the aforementioned cases indicates that a chill of expressive conduct constitutes a constitutional injury-in-fact sufficient to confer standing; to our knowledge, no circuit has concluded to the contrary.[8]

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[8] In the Fourth Circuit, Judge Michael argued persuasively in dissent that previously chilled speech presents "a classic First

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In support of its contrary conclusion, the majority reads the holding of *Laird v. Tatum,* 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), in an overly broad manner not warranted by precedent from either our own or our sister circuits. In *Laird,* a group of citizens brought a class action seeking declaratory and injunctive relief, arguing that the Army's investigative and data-gathering activities chilled their exercise of First Amendment rights. The Supreme Court concluded that the plaintiffs had not alleged a sufficiently specific injury, noting that a "subjective chill" cannot substitute for "specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S.Ct. 2318.

I do not believe this concern regarding a "subjective chill" applies here, as *Laird* is easily distinguishable. *Laird* was a narrow decision, and the Court took pains to cabin its holding to the particular facts of that case, stating, "[O]ur conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts." *Laird,* 408 U.S. at 15, 92 S.Ct. 2318. Most significantly, the plaintiffs in *Laird* did not challenge the constitutionality of the statute that they alleged chilled their

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Amendment injury." *Reyes v. City of Lynchburg,* 300 F.3d 449, 458 (4th Cir.2002) (Michael, J., dissenting). The majority opinion neither quibbled with nor endorsed this view, but instead concluded that the plaintiff failed to show that the defendant city's decision to prosecute him had chilled his speech. *Id.* at 455 n. 8.

speech. *Id.* at 5, 92 S.Ct. 2318. By contrast, Morrison argues that the school district's 2004-05 anti-harassment policy directly prohibited constitutionally protected speech in violation of the First Amendment. The *Laird* Court emphasized that it faced a case in which "the chilling effect ar[o]se merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Id.* at 11, 92 S.Ct. 2318. To the contrary, in this case (as in a series of other "chilling" cases that the *Laird* Court distinguished), "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the plaintiff was either presently or prospectively subject to the regulations, proscriptions or compulsions that he [i]s challenging." *Id.* at 11, 92 S.Ct. 2318. Unlike the plaintiffs in *Laird,* therefore, Morrison does not argue that information-gathering or similar activities have chilled his speech but rather that a regulatory proscription on speech chilled his speech. The majority reads *Laird* in a manner more capacious than prior interpretations in order to draw a strained analogy between Morrison's claim and that of the plaintiffs in *Laird.* The majority does so without addressing any of my arguments distinguishing *Laird,* resulting in an opinion that significantly restricts standing under the First Amendment.

The *Laird* Court's concern regarding a significant attenuation between the action or policy complained of and the chill alleged does not apply here. *See infra* Pt. III.A.2.(b). Morrison challenges a *rule* that was intended to govern his speech and that of his cohorts, not data-gathering activities. Consequently, this is not a case in which the plaintiff has "left somewhat unclear the precise connection between" the action or policy complained of and the chill alleged, as was the case in *Laird*. *Id.* at 13 n. 7, 92 S.Ct. 2318. Moreover, the *Laird* Court was also motivated by its desire to avoid the federal courts becoming "virtually continuing monitors of the wisdom and soundness of Executive action." *Id.* at 15, 92 S.Ct. 2318. This case presents no such threat.

For the foregoing reasons, I believe that *Laird* does not control, and that we should follow the lead of the Second, Fifth, Ninth, and Tenth Circuits (in *Husain, Howard Gault Co., White*, and *Archer,* respectively). The majority opinion deduces a new standard from a survey of the caselaw, proposing that a "subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." Maj. Op. at 609. This standard unnecessarily muddles established doctrine and because of its lack of clarity may also contradict the Supreme Court's holding that to obtain standing a plaintiff must allege "a 'claim of specific present objective harm *or a threat of specific future harm.*'" *Bigelow v. Virginia*, 421 U.S. 809, 816-17, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (quoting *Laird*, 408 U.S.

at 13-14, 92 S.Ct. 2318) (emphasis added). The majority's "specific action" requirement may occlude the doctrine that a threat which chills a plaintiff's speech constitutes an injury-in-fact.

In this case, Morrison argues that the 2004-05 speech policy threatened him with suspension if he spoke out about his views on homosexuality. In February 2005 when Morrison filed his complaint, the threatened suspension loomed above him "like the proverbial sword of Damocles" and silenced his speech. *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 882, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). The Supreme Court does not require that a plaintiff who is specifically threatened with punishment if he engages in particular speech must "first expose himself to actual [punishment] to be entitled to challenge a [regulation] that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The 2004-05 speech policy itself amounted to a specific threat regarding future harm and is sufficient to confer standing on Morrison.

The cases cited by the majority, in support of the general proposition that the courts dismiss cases for lack of standing when plaintiffs assert only inhibition of speech, are readily distinguishable. In *Grendell v. Ohio Supreme Court,* 252 F.3d 828, 834 (6th Cir.2001), we held that the chilling effect caused by an attorney's fear of future sanctions, which might hypothetically be imposed in an unconstitutional manner, did not confer standing. Likewise, in *Adult*

Video Ass'n v. United States Department of Justice, 71 F.3d 563, 566 (6th Cir.1995), we held that the chilling effect caused by "*concededly valid* criminal antiobscenity laws [on] the distribution of what [the plaintiffs] believe[d] to be constitutionally protected materials" did not confer standing. Neither of these cases, however, involved the type of direct, regulatory proscription on protected speech akin to the school district policy at issue in this case. While *Grendell* and *Adult Video* resembled *Laird* in that they involved constitutionally valid judicial and government actions that caused plaintiffs to experience a subjective chill, there is little subjective about the silence induced by the unambiguously punitive ban on speech at issue in this case. The District of Columbia Circuit's denial of standing in *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-79 (D.C.Cir.1984), is similarly inapposite because that case involved plaintiffs' challenge to intelligence-gathering activities rather than a regulatory proscription on speech. At the time Morrison filed his complaint, the instant case did not implicate merely Morrison's "difficulty [in] determining the application of a regulatory provision to [his] conduct," but rather the "imminence of concrete, harmful action," i.e., suspension, "for specifically contemplated First Amendment activity," i.e. criticism of homosexuality. *Id.* at 1380. Accordingly, I think that the caselaw within our circuit and our sister circuits requires the conclusion that the chill on Morrison's speech constitutes a sufficient injury-in-fact to satisfy the first part of the test for standing.

I should note that although the school district is the defendant in this case, we may also look at the BCHS Code of Conduct as well as at the BCHS training video to determine whether Morrison suffered an injury-in-fact. The majority argues that we may only look at the school board's 2004-05 speech policy to determine harm. The majority's citation to two Supreme Court and Sixth Circuit cases, however – *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Doe v. Claiborne County,* 103 F.3d 495 (6th Cir.1996) – does not support this conclusion. Maj. Op. at 608 n. 6.

Before explaining why the majority's reliance on *Monell* and *Doe* is misguided, however, I think it is important to observe that in assessing standing under the official school district policy we are not evaluating the merits of Morrison's claim. "The party invoking federal jurisdiction bears the burden of establishing" jurisdiction, including the elements of standing. *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* Accordingly, "[i]n response to a summary judgment motion, . . . the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.* To the extent, then, that the majority emphasizes that we may consider the official policy alone, for the purpose of suggesting that the official policy does not

raise a constitutional dilemma even if the BCHS Code of Conduct and training videos do so, the majority improperly intermingles the merits with the issue of standing. The question at this stage of the litigation is whether Morrison has set forth specific facts which if taken as true establish the elements of standing: injury-in-fact, causation, and redressability.

The majority mistakenly cites *Monell* for the proposition that a plaintiff may bring a § 1983 claim only when a local government body violates an official policy. Instead, *Monell* held that "although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." 436 U.S. at 690-91, 98 S.Ct. 2018. In this case, Morrison argues that the school district's official speech policy during the 2004-05 academic year violated his right to free speech; thus, Morrison does not need to rely on *Monell*'s holding to support his claim. To the extent that the BCHS Code of Conduct and training video constituted customary means of enforcing the speech policy, *Monell* only further supports Morrison's argument that both the school district policy on its face and its mode of enforcement violated the First Amendment.

Neither does *Doe v. Claiborne County* buttress the majority's conclusion that we may evaluate only

the school district's official policy. In *Doe,* we held that to win a § 1983 claim arising from a teacher's sexual abuse, the plaintiff would have to show that the defendant board of education had a custom of condoning or tolerating such abuse and that this custom or policy caused her injury. 103 F.3d at 507-08. Here, Morrison has established the requisite link between school district policy and the BCHS Code of Conduct and training video by showing that these materials represented efforts by BCHS to enforce the school district's official policy. Moreover, the school district's attorney conceded at oral argument that BCHS gave students only the Code of Conduct and not the school district policy. Although the district made the latter available on the internet, the students at BCHS would have reasonably concluded that the Code of Conduct represented the school district's practical enforcement of official policy. In conclusion, although I believe that Morrison should be able to establish standing on the basis of the injury caused by official school district policy alone, I also believe that the further injury caused by the BCHS Code of Conduct and training video supports his argument for standing. The majority's interpretations of precedent to the contrary are completely misguided.

b. Causation

Morrison easily satisfies the causation part of the standing inquiry. The Complaint alleges that "[t]he named student plaintiff has refrained from conveying his views on homosexuality to his classmates because

the School District policies restricting speech prohibit him from doing so." J.A. at 26 (Compl. ¶ 34). Further, Morrison testified through affidavit that he held his tongue because of the policy. This testimony is uncontroverted.

c. Redressability

Finally, I believe that Morrison satisfies the third part – redressability – of the standing inquiry. To reiterate, our analysis must evaluate the redressability part of the test for standing at the time Morrison filed his complaint. *Cleveland Branch, NAACP,* 263 F.3d at 524-26. When Morrison filed his complaint in February 2005, the school district had not yet amended its speech policy. Morrison alleged in his complaint that the policy then in place restricted his constitutionally protected speech and silenced him in violation of the First Amendment. "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Friends of the Earth,* 528 U.S. at 185-86, 120 S.Ct. 693. The United States District Court for the Eastern District of Kentucky had the capacity to redress Morrison's injury by enjoining the then-existing anti-harassment policy and awarding him damages.

In support of the conclusion that nominal damages cannot redress a past chill on speech caused by a

legal regime that no longer exists, the majority relies wholly upon a single judge's concurrence in *Utah Animal Rights.* Writing for himself alone, Judge McConnell argued that nominal damages should not render a case live that would otherwise be moot because the legal regime being challenged no longer exists. *Utah Animal Rights,* 371 F.3d at 1267-68 (10th Cir.2004) (McConnell, J., concurring). The portion of Judge McConnell's opinion which the majority cites made an argument about mootness not redressability. This is in keeping with well-established doctrine that to obtain standing, a plaintiff must have a redressable injury at the time of the filing of the complaint, while mootness addresses whether a live controversy continues to exist after a change of circumstances.

The majority's reliance on Judge McConnell's concurrence with respect to the redressability component of standing is mistaken for an additional reason. Judge McConnell recognized that his argument would require overturning established Tenth Circuit precedent. *Id.* at 1267. Indeed, that is why Judge McConnell was able also to author the majority in *Utah Animal Rights,* holding that however "odd," "a complaint for nominal damages could satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not." 371 F.3d at 1257. Judge McConnell's concurrence represents a singular opinion admittedly contrary to the caselaw in his own circuit and is not persuasive precedent capable of buttressing the majority's argument that Morrison does not have standing.

The majority argues that "[t]his case should be over" because the legal regime that Morrison challenges no longer exists. Maj. Op. at 611. Because the majority's argument centers on whether the instant case is live at the time of the appeal, rather than with whether the district court could redress Morrison's injury at the time of the filing of his complaint, I believe that a concern with mootness rather than redressability animates the majority's opinion.[9] As I have explained, the majority's statement that nominal damages cannot redress a past chill on speech misunderstands the redressability component of standing and is not supported by authoritative precedent.[10] Tellingly, the majority does not disagree with

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[9] Even Judge McConnell's concurrence highlighted the distinction between these two doctrines of justiciability. He wrote that "[s]tanding doctrine addresses whether, at the inception of the litigation, the plaintiff had suffered a concrete injury that could be redressed by action of the court. Mootness addresses whether the plaintiff continues to have such a stake throughout the course of the litigation." *Utah Animal Rights*, 371 F.3d at 1263. Accordingly, while Judge McConnell believed that the case before him should be moot (even though Tenth Circuit precedent mandated the contrary holding), he concluded that plaintiffs in *Utah Animal Rights* did have standing. *Id.* at 1264. The majority thus misapplies the only source on which it relies.

[10] The majority opinion, Maj. Op. at 610, correctly alludes to a statement by Morrison's counsel at oral argument that Morrison sought a "declaratory judgment that the speech policies of 2004-2005 were unconstitutional, due to our nominal damages claim." The majority opinion then cites Judge McConnell's concurrence in *Utah Animal Rights* for the proposition that nominal damages cannot redress past unconstitutional policies

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my argument that, under clearly established Sixth Circuit precedent, a claim for nominal damages suffices to preserve a case as live even if the challenged legal regime no longer exists. In effect, I think the majority opinion mistakenly camouflages a belief that the case is moot in a discussion of redressability, resulting in an opinion that misinterprets standing doctrine and is silent with respect to relevant precedent concerning mootness doctrine.

Because my argument regarding mootness stands unchallenged and because I believe that Morrison's injury caused by the school district's policy was redressable at the time he filed his complaint, I believe both that Morrison has standing and that the instant case represents a live controversy.

In conclusion, I must respond to the majority's conclusion that allowing a suit for nominal damages to proceed "trivializes the important business of the federal courts." Maj. Op. at 611. This conclusion undermines our own precedent holding that cases for

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and ca[illegible] provide "effectual relief, *but only with respect to future dealin[illegible]* between the parties." *Id.* at 610-11 (quoting *Utah Animal Rights*, 371 F.3d at 1267-1268). The majority's logic is flawed for the same reasons that its broader reliance on Judge McConnell's concurrence is flawed: the McConnell concurrence itself admits that it conflicts with binding Tenth Circuit precedent; the concurrence is also in conflict with Sixth Circuit caselaw; the concurrence discusses mootness and not standing doctrine; and standing must be evaluated from the perspective of the time at which the plaintiff filed his or her complaint.

nominal damages are not moot even when the challenged legal regime no longer exists. Furthermore, the majority's peevish sense that the instant action is a waste of the federal courts' time minimizes the federal courts' essential role in protecting free expression under the First Amendment. Public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Far from dismissing the importance of free speech in the schools, the Supreme Court has admonished that "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)). Thus, while the Court "has long recognized that local school boards have broad discretion in the management of school affairs," the Court has "at the same time . . . necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863-64, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (plurality opinion).

B. Merits

Because this case involves private student expression occurring on a school campus rather than school-sponsored speech, we analyze Morrison's claim under the standard set forth in *Tinker v. Des Moines Independent Community School District* rather than the standard set forth in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). *Curry ex rel. Curry v. Hensiner,* 513 F.3d 570, 576-77 (6th Cir.2008); *Poling v. Murphy,* 872 F.2d 757, 762 (6th Cir.1989), *cert. denied,* 493 U.S. 1021, 110 S.Ct. 723, 107 L.Ed.2d 742 (1990). *Tinker* held that schools cannot restrict student speech that neither "materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school" nor "collid[es] with the rights of others." 393 U.S. at 513, 89 S.Ct. 733. In *Morse v. Frederick,* ___ U.S. ___, 127 S.Ct. 2618, 2625, 168 L.Ed.2d 290 (2007), the Supreme Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." While acknowledging that "the mode of analysis set forth in *Tinker* is not absolute," *id.* at 2627, the Court also reaffirmed the doctrine that a school may not prohibit student speech solely on the ground that the speech is "offensive." *Id.* at 2629. Of the five justices in the majority, two who joined the Court's opinion construed it as going "no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal

drug use and . . . provid[ing] no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Id.* at 2636 (Alito, J., concurring). Therefore, the holding of *Morse* is inapplicable here, and the *Tinker* mode of analysis remains the correct framework in this case.

The Board asks us to affirm the district court's grant of summary judgment on the merits, arguing that the policies in effect during the 2004-05 school year were consistent with the standard set out in *Tinker*. At the same time, Morrison asks us to grant him summary judgment on his nominal damages claim because his affidavit testimony that he withheld his speech because of the policy was uncontradicted, and because the policy, he claims, fails to comport with *Tinker*. I would decline both parties' entreaties and instead reverse the district court's judgment insofar as it pertains to Morrison's free-speech claim seeking nominal damages and remand for further proceedings. I would do so for two reasons.

First, there remains a genuine issue of material fact regarding the policy applicable to Morrison during the 2004-05 school year. The Board contends that Morrison could not have been disciplined because the *school district's* speech policy contained a savings clause preventing it from "apply[ing] to speech otherwise protected under the state or federal constitutions. . . ." J.A. at 120 (2004-05 Sch. Dist. Policy 09.42811). The BCHS Code, by contrast, contains no such savings clause in either of its definitions of harassment. The first definition restricted

harassment to "unlawful behavior based on" a protected characteristic, including sexual orientation, "that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment." J.A. at 270 (2004-05 BCHS Student Code at 3). This definition tacks quite closely to the *Tinker* standard. *See Tinker*, 393 U.S. at 513, 89 S.Ct. 733. The other definition, by contrast, does not. Under the heading "DISCIPLINARY INFRACTIONS," the 2004-05 BCHS Code defined harassment to include "the use of language . . . in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual." J.A. at 277 (2004-05 BCHS Student Code at 16). Immediately following this definition, the BCHS Code listed a series of consequences for violating the prohibition on harassment, which could be read as implying that this represents the operative definition of harassment.

If these inconsistencies were not enough, it is also unclear to what extent the statements in the training video represented the school's policy. The video's prohibition appears to have been even broader than the latter definition of harassment in the Student Code, as the video informed students that "[t]here is not permission for you to point . . . out" areas in which they disagree with other students. J.A. at 229 (BCHS Training Video Tr. at 29). Because the district court did not address the merits of Morrison's free-speech claim, it did not have occasion to

determine which policy governed Morrison's conduct at school during the 2004-05 academic year. I would decline to address this issue in the first instance, concluding that the more prudent course of action is to remand the case to the district court for appropriate factual development.

Second, I believe that an objective inquiry is necessary in addition to an inquiry into whether Morrison personally experienced chilled speech, as he alleges. If individual chill alone were enough to prove a violation of the First Amendment, such a holding would permit anyone who operates under an unconstitutional speech policy to sue (within the applicable statute of limitations) and win merely by filing an affidavit claiming that the policy prevents him or her from saying something that he or she wishes to say. For the plaintiff to win his or her claim on the merits, however, he or she must not only prove that the personal chill occurred but also must meet a more objective standard.

I find support for such a requirement in our case law, specifically in our jurisprudence regarding First Amendment retaliation claims. Plaintiffs alleging such claims must prove that "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in [First Amendment-protected] conduct." *Thaddeus-X v. Blatter,* 175 F.3d 378, 394 (6th Cir.1999) (en banc). This element introduces an objective component into the First Amendment inquiry by requiring that the adverse action "would deter a person of ordinary

firmness from" exercising First Amendment rights. Along these lines, I would hold that when a plaintiff seeks to prove under the First Amendment a damages claim premised upon chilled speech, he or she must establish that the policy or action of the defendant would deter a person of ordinary firmness from exercising his or her First Amendment rights in the way the plaintiff alleges he or she would have, but for the defendant's action or policy. I am not alone in this view, as the Ninth Circuit requires plaintiffs in similar cases to establish this element. *See White v. Lee,* 227 F.3d 1214, 1228 (9th Cir.2000).

As the parties have not had occasion to address this element, I would leave it for the district court to do so on remand.

IV. CONCLUSION

For the reasons described above, I believe that an allegation of a chill of First Amendment-protected activity is sufficient to confer standing. Furthermore, a First Amendment challenge to a legal regime no longer in existence is not moot when a plaintiff seeks relief in the form of nominal damages. I also believe that to establish such a claim on the merits, a plaintiff must show that the defendant's actions or policy would deter a person of ordinary firmness from exercising his or her First Amendment liberties in the way that the plaintiff alleges he or she would have, were it not for the defendant's conduct or policy. Consequently, I would reverse the district court's

grant of summary judgment to the Board, but only insofar as it pertains to Morrison's free-speech claim seeking nominal damages. I would also remand this case to the district court for further proceedings consistent with this opinion.

507 F.3d 494

United States Court of Appeals, Sixth Circuit.
Timothy MORRISON et al.,
Plaintiffs-Appellants,
v.
BOARD OF EDUCATION OF BOYD COUNTY et al.,
Defendants-Appellees.
Timothy Morrison et al.,
Plaintiffs-Appellants
(06-5406)/Cross-Appellees,
v.
Board of Education of Boyd County,
Defendant-Appellee,
William Carter et al.,
Intervenors-Defendants-Appellees/
Cross-Appellants (06-5407).
Nos. 06-5380, 06-5406, 06-5407.

Argued: July 25, 2007.
Decided and Filed: Oct. 26, 2007.

ARGUED: Joel L. Oster, Alliance Defense Fund, Leawood, Kansas, for Plaintiffs. Sharon McGowan, American Civil Liberties Union, New York, New York, Winter R. Huff, Law Offices of John G. Prather, Somerset, Kentucky, for Defendants.

ON BRIEF: Joel L. Oster, Kevin H. Theriot, Alliance Defense Fund, Leawood, Kansas, Benjamin W. Bull, Gary McCaleb, Alliance Defense Fund, Scottsdale, Arizona, for Plaintiffs. Sharon McGowan, Kenneth Y. Choe, American Civil Liberties Union, New York, New York, Winter R. Huff, Law Offices of John G. Prather, Somerset, Kentucky, Kimberly S.

McCann, Van Antwerp, Monge, Jones & Edwards, Ashland, Kentucky, David A. Friedman, Fernandez, Friedman, Haynes & Kohn, Louisville, Kentucky, for Defendants.

Before: MOORE and COOK, Circuit Judges; ADAMS, District Judge.*

MOORE, J., delivered the opinion of the court, in which ADAMS, D.J., joined. COOK, J. (p. 507-08), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Timothy Morrison ("Morrison") was a student at Boyd County High School ("BCHS"). He is a Christian, and he believes that homosexuality is a sin. He further believes that part of his responsibility as a Christian is to tell others when their conduct does not comport with his understanding of Christian morality. During the 2004-05 academic year, BCHS had a written policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation. Morrison did not want to be punished, so he kept to himself his beliefs regarding homosexuality.

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* The Honorable John R. Adams, United States District Judge for the Northern District of Ohio, sitting by designation.

After Morrison filed this lawsuit, the Board of Education of Boyd County ("Board") changed the BCHS policy, but the litigation did not end. We must now decide whether Morrison's claim for nominal damages premised upon the "chill" on Morrison's speech during the 2004-05 school year presents a justiciable controversy. We conclude that it does and accordingly **REVERSE** the district court's grant of summary judgment to the school board on this claim. Because genuine issues of material fact prevent us from determining the merits of Morrison's free-speech claim, we **REMAND** the case to the district court for further proceedings.

I. BACKGROUND

A. Factual Background

In 2002, some students at Boyd County High School ("BCHS") petitioned to start a chapter of the Gay Straight Alliance ("GSA"). *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County,* 258 F.Supp.2d 667, 670 (E.D.Ky.2003). Their efforts were met with hostility, which was not very surprising given BCHS students' history of intolerance toward homosexuality. *Id.* at 670-74. To quell the hostility, within two months of approving the GSA, the school banned the GSA, as well as purported to ban all other student organizations for the 2002-03 school year. *Id.* at 675.

In response, a group of students who had attempted to spearhead the GSA chapter and their

parents sued the school district in federal court. After the district court issued a preliminary injunction requiring the school board to give the GSA chapter equal access to that afforded other student groups, *id.* at 693, the suit ended in a consent decree. One provision in the consent decree required the school district to adopt policies prohibiting harassment on the basis of actual or perceived sexual orientation, and to provide mandatory anti-harassment training to all students.

Prior to the 2004-05 school year, in attempting to comply with the consent decree, the school district adopted Policy 09.42811 as the district-wide anti-harassment policy. Policy 09.42811 prohibited "Harassment/Discrimination," which it defined as

> unlawful behavior based on race, color, national origin, age, religion, sex[,] actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.
>
> The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process. . . .

Joint Appendix ("J.A.") at 120. BCHS's 2004-05 Code of Conduct repeated the first paragraph of Policy

09.42811, J.A. at 270 (BCHS Code at 3) but later stated:

> Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.

J.A. at 277 (BCHS Code at 16).

Additionally, the school district created two training videos – one for Boyd County Middle School ("BCMS") and one for BCHS – to fulfill the anti-harassment training provisions of the consent decree. As relevant here, the high school training video included a lengthy discussion of the ills of bullying and name-calling. The participants included a BCHS social studies teacher,[1] some students, an "ADL Facilitator,"[2] and a clinical psychologist. Additionally, the BCHS training video contained a passage discussing sexual orientation. Near the end of this passage, the clinical psychologist stated,

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[1] This teacher was also the "compliance coordinator" under the consent decree.

[2] Although the record is unclear, it appears that "ADL" stands for "Anti-Defamation League."

> . . . . We all get self-centered and start to think that our way is the right way and our way is the correct way. We all want to believe that we have evidence that our way is the correct way. . . .
>
> "So . . . no matter where you go, no matter what you do, no matter who you meet, you are going to find people that you don't like. You're going to find people that you disagree with. You're going to find people that you don't like the way they act. It can't be avoided, not, not anywhere in the world, it can't be avoided. You're going to find people that you believe are absolutely wrong. You're going to think[, W]hat are they thinking? That, that is so wrong, it[']s obvious to everybody[." B]ut not to them. Because they believe you are wrong. You can't avoid meeting people that you believe are wrong. But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. *Just because you believe that does not give you permission to say anything about it.* It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. *There is not permission for you to point it out to them.*

J.A. at 229 (BCHS Training Video Tr. at 29) (emphasis added).

The new policies and the mandatory training sparked further acrimony in Boyd County. This time,

some parents feared that the training would discourage, and the policies would prohibit, their children from speaking about their religious beliefs regarding homosexuality. Some parents withheld their children from the mandatory training. Eventually, a group of parents and students sued.

B. Procedural Background

On February 15, 2005, a group of plaintiffs[3] filed their complaint in the United States District Court for the Eastern District of Kentucky. They named the Boyd County Board of Education ("Board") as the sole defendant and pursued claims under 42 U.S.C. § 1983 for violations of various constitutional rights, specifically, their rights to free speech (styled as the "FIRST CAUSE OF ACTION"), due process (second cause of action), equal protection (third cause of action), and free exercise of religion (fourth cause of action). The crux of the plaintiffs' complaint is that the speech codes in effect during the 2004-05 school year prevented students in Boyd County from speaking their convictions that homosexuality is sinful, and the speech codes and training together undermined their

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[3] The only plaintiff whose claim is relevant at this point of the litigation is Timothy Allen Morrison II ("Morrison"). At the time the complaint was filed, Morrison was a student at BCHS. The other plaintiffs are his parents Timothy and Mary Morrison, Brian Nolen, and Debora Jones. Both Nolen and Jones are parents of students who attended Boyd County Middle School at some time relevant to this case.

ability to practice their Christian faith. For these asserted violations, the plaintiffs sought declaratory relief, injunctive relief, actual damages, nominal damages, costs, and attorney fees.

On April 18, 2005, the district court permitted the plaintiffs from the earlier action to intervene. The intervenors filed their Answer in Intervention that day, denying that the plaintiffs had suffered any constitutional violations.[4]

In August 2005, the Board revised its policy, as well as the BCMS and BCHS student codes of conduct. Under the revised codes, anti-homosexual speech would not be prohibited unless it was "sufficiently severe or pervasive that it adversely affects a student's education or creates a climate of hostility or intimidation for that student, both from the perspective of an objective educator and from the perspective of the student at whom the harassment is directed." J.A. at 655 (2005-06 BCHS Code of Conduct at 40); *accord* J.A. at 642 (2005-06 BCMS Discipline Code at 16). Additionally, the BCHS Code of Conduct stated, "The civil exchange of opinions or debate does not constitute harassment. Students may not, however, engage in behavior that interferes with the rights of another student or materially and substantially disrupts the educational process." J.A. at 655 (2005-06 BCHS Code of Conduct at 40).

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[4] Later, the intervenors changed their position and argued that the 2004-05 BCHS speech code was unconstitutional.

After these revisions, the parties filed cross-motions for summary judgment. On February 17, 2006, the district court issued its opinion and judgment granting the Board's motion and denying both the plaintiffs' and the intervenors' motions. Noting the changes that had been made to the policies that were initially challenged, the district court indicated that it was "not inclined to adjudge the constitutionality of policies no longer in effect," and rejected all of the Plaintiffs' challenges to the written policies on this basis. J.A. at 672 (Dist. Ct. Mem. Op. at 7). Additionally, the district court determined that the Plaintiffs' claim for damages failed because "Plaintiffs were unable to specify the measure and amount of their alleged damages." J.A. at 680 (Dist. Ct. Mem. Op. at 15). The district court further stated that "even their request for nominal damages remains unsupported by any factual allegations," and that "Plaintiffs have made no specific plea" for damages incurred prior to the Board's change in policies. *Id.*

After the district court entered a corrected judgment for reasons not relevant to this appeal, both the plaintiffs and the intervenors timely appealed.

II. JURISDICTION

The district court had federal-question jurisdiction over this 42 U.S.C. § 1983 action. 28 U.S.C. § 1331. We have jurisdiction over the plaintiffs' appeal from an adverse final judgment. *Id.* § 1291.

III. ANALYSIS

Our initial task is to determine exactly which claims are, and which are not, presented in this appeal. First, the plaintiffs do not challenge the district court's rejection of their free-exercise claim, which we accordingly do not consider. Next, the district court concluded that once the school district had revised its policy in a fashion acceptable to the plaintiffs and intervenors, the plaintiffs' claims seeking forward-looking relief, i.e., declaratory and injunctive relief, became moot. The plaintiffs do not challenge this conclusion on appeal, so we do not consider their claims seeking such relief.

The plaintiffs, however, also pursued claims for damages, both nominal and compensatory. On appeal, the plaintiffs pursue only their claim for nominal damages and seek to premise this claim on Timothy Morrison's (the BCHS student plaintiff's) "chilled" speech during the 2004-05 school year. Consequently, the only plaintiff who may have a live claim is Timothy Morrison. Accordingly, Morrison's free-speech claim seeking nominal damages is the only claim that we consider on appeal.[5]

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[5] The plaintiffs' briefs also press their equal-protection and due-process claims, but the arguments offered in support of their equal-protection theory are wholly duplicative of their free-speech arguments. The plaintiffs' due-process theory – that the 2004-05 speech code was unconstitutionally vague – similarly presents a First Amendment argument under a different label. Indeed, the primary case that the plaintiffs' brief cites in support

(Continued on following page)

A. Justiciability

1. Mootness

The district court concluded that, because the school district had changed its policy, the case was moot, notwithstanding Morrison's claim for nominal damages. It offered two reasons for this analysis: First, the district court said that the plaintiffs had never requested nominal damages specifically for the period preceding the Board's amendment of the offending policies. Second, the district court said that the plaintiffs failed to substantiate the nominal-damages claim with factual allegations.

We believe that the first reason is inaccurate, as the complaint clearly requests "an award of actual and nominal damages in an amount deemed appropriate by" the district court. J.A. at 34 (Compl. at 14, ¶ d.). Because the offending policy was in effect when the plaintiffs filed their complaint, their request for nominal damages could have addressed only the period preceding the Board's amendment.

The district court's second reason misapprehends the nature of nominal damages. Nominal damages

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of their due-process argument, *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir.2002), analyzed the plaintiff's void-for-vagueness theory as a First Amendment argument. *Id.* at 266-67. Because the plaintiffs' due-process and equal-protection arguments are essentially First Amendment arguments masquerading as Fourteenth Amendment arguments, we do not address them separately.

are awarded when there is no proof of an actual injury. *Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (holding that district court has power to award nominal damages for a denial of procedural due process when there is no proof of actual injury). As one of our out-of-circuit colleagues recently recognized, nominal damages "do not purport to compensate for past wrongs. They are symbolic only." *Utah Animal Rights Coal. v. Salt Lake City Coal.,* 371 F.3d 1248, 1264 (10th Cir.2004) (McConnell, J., concurring). We have similarly recognized that nominal damages are appropriate when a plaintiff proves a constitutional violation but lacks proof of an actual injury. *Sutton v. Cleveland Bd. of Educ.,* 958 F.2d 1339, 1352 (6th Cir.1992) (procedural due-process claim; citing *Carey v. Piphus*).

Moreover, because nominal damages are a symbolic remedy for past wrongs, a prayer for nominal damages precludes a finding of mootness, even when the defendant has altered or abandoned the allegedly unconstitutional policy forming the basis for the plaintiff's complaint. *Murray v. Bd. of Trs., Univ. of Louisville,* 659 F.2d 77, 79 (6th Cir.1981) (remanding First Amendment case to district court for adjudication of plaintiff's nominal-damage claim); *see also Blau v. Ft. Thomas Pub. Sch. Dist.,* 401 F.3d 381, 387 (6th Cir.2005) ("[T]he existence of a damages claim ensures that this dispute is a live one. . . ."); *id.* at 387-88 (citing cases); *Lynch v. Leis,* 382 F.3d 642, 646 n. 2 (6th Cir.2004) ("[A] claim for nominal damages . . . is normally sufficient to establish standing, defeat

mootness, and grant prevailing party status. . . ."); *Utah Animal Rights Coal.*, 371 F.3d at 1257-58 (following Tenth Circuit precedent holding that claim for nominal damages is sufficient for justiciability); *id.* at 1268 (McConnell, J., concurring) (noting that the Sixth Circuit as well as the Ninth Circuit holds that a nominal-damages claim precludes mootness, but disagreeing with the rule); *id.* at 1275 (Henry, J., concurring) ("[T]he Supreme Court has directly and indirectly indicated that a claim for nominal damages in a constitutional case may vindicate rights that should be scrupulously observed, and hence, such a case is not, nor should it be, moot."). For these reasons, Morrison's nominal-damages claim is not moot.

2. Morrison's Standing

We next consider Morrison's standing to bring his nominal-damages claim. The key questions here are whether a past "chill" on a plaintiff's speech is a sufficient injury to confer standing and whether nominal damages sufficiently redress such a harm.

Generally, concerns regarding "chilled" speech are forward-looking. For example, the doctrine of overbreadth constitutes an exception to prudential standing requirements and permits a party with constitutional standing to raise First Amendment claims of third parties who are not present, but whose speech may be chilled in the future if the regulation stands. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir.2007); *West v. Derby Unified*

Sch. Dist. No. 260, 206 F.3d 1358, 1367 (10th Cir.2000). Similarly, a statute may be void for vagueness if it would deter would-be speakers from speaking because they cannot tell whether their intended speech falls within the statute's prohibitions. *See, e.g., Reno v. ACLU,* 521 U.S. 844, 871-72, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("The vagueness of [a content-based speech] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (noting that a vague statute "operates to inhibit the exercise of [First Amendment] freedoms" (citation omitted)). Here, however, Morrison focuses on a *past* chill, rather than a future chill, arguing that he *would have* spoken during the 2004-05 school year, but that the speech code then in effect prevented him from doing so.

To determine whether such a chill confers standing, we apply a three-part test. A plaintiff has constitutional standing when he or she can show: (1) an injury-in-fact that; (2) was "fairly traceable to the defendant's allegedly unlawful conduct"; and (3) is "likely to be redressed" via a favorable decision. *Prime Media,* 485 F.3d at 349 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). We consider these parts in turn.

a. Injury-In-Fact

The Supreme Court has defined an "injury-in-fact" as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks and citations omitted). If a prospective chilling effect on speech is sufficiently injurious that courts allow parties otherwise without prudential standing to raise a claim designed to prevent this chill (via an overbreadth challenge), then a past chill must constitute an injury in fact.

Case law supports this conclusion. Our sister circuits have held, both implicitly and explicitly, that a past chill is a constitutional injury-in-fact. For instance, in *White v. Lee,* 227 F.3d 1214 (9th Cir.2000), the Ninth Circuit held that government officials' "eight-month investigation into the plaintiffs' [associational] activities and beliefs chilled the exercise of their First Amendment rights," which entitled the plaintiffs "to seek a remedy for this constitutional violation." *Id.* at 1226. Similarly, in *National Commodity & Barter Ass'n v. Archer,* 31 F.3d 1521 (10th Cir.1994), the Tenth Circuit held that an organizational plaintiff could premise a *Bivens* claim seeking damages for a violation of First Amendment associational rights upon overzealous investigative procedures that had a chilling effect on its members' associational rights. *Id.* at 1530. The court implicitly concluded that a chill represents an injury-in-fact, stating that the plaintiffs could "establish their First

Amendment claim" by "prov[ing] wrongful conduct by the defendant and that such conduct had a chilling effect on the plaintiffs' organizational activities and associational rights." *Id.* at 1531 n. 4.

Additionally, in *Howard Gault Co. v. Texas Rural Legal Aid, Inc.,* 848 F.2d 544 (5th Cir.1988), the Fifth Circuit suggested, if not implicitly held, that chilled speech constitutes an injury-in-fact. There, the court sustained an award of damages to compensate a plaintiff "for whatever injuries [he] may have suffered to his reputation and from the chilling effect the TRO had on the exercise of his First Amendment rights." *Id.* at 557. And more recently, the Second Circuit joined this chorus with its opinion in *Husain v. Springer,* 494 F.3d 108 (2d Cir.2007). In *Husain,* a group of college-student journalists sued, claiming that the college president violated their First Amendment rights by nullifying the results of, and rescheduling, a student-government election in response to a hyper-partisan issue of a college newspaper. They sought nominal damages and premised this First Amendment claim upon chilled speech, specifically, the paper's subsequent reduction in election coverage out of fear that favorable coverage would lead to the disqualification of a candidate. *See id.* 494 F.3d at 119 (noting that "the *College Voice* editors decided to give their endorsement of [a student party running the subsequent school year] less prominence" as a result of the election nullification). Even though the results of the nullified election and the subsequent election were identical, the court held

that the "chilling effect" upon the paper's coverage "g[ave] rise to a First Amendment injury." *Id.* at 128; *see also id.*(concluding that the election nullification "violated the plaintiffs' First Amendment rights as a result of the chill on student speech that it created"). Each of the aforementioned cases indicates that a past chill of expressive conduct constitutes a constitutional injury-in-fact sufficient to confer standing; to our knowledge, no circuit has concluded to the contrary.[6]

The only arguably contrary case we have located is *Laird v. Tatum,* 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). In *Laird,* a group of citizens brought a class action seeking declaratory and injunctive relief, arguing that the Army's investigative and data-gathering activities chilled their exercise of First Amendment rights. The Supreme Court concluded that the plaintiffs had not alleged a sufficiently specific injury, noting that a "subjective chill" cannot substitute for "specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S.Ct. 2318.

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[6] In the Fourth Circuit, Judge Michael argued persuasively in dissent that previously chilled speech presents "a classic First Amendment injury." *Reyes v. City of Lynchburg,* 300 F.3d 449, 458 (4th Cir.2002) (Michael, J., dissenting). The majority opinion neither quibbled with nor endorsed this view, but instead concluded that the plaintiff failed to show that the defendant city's decision to prosecute him had chilled his speech. *Id.* at 455 n. 8.

We do not believe this concern regarding a "subjective chill" applies here, as *Laird* is easily distinguishable. Most significantly, the *Laird* Court addressed only claims for forward-looking relief, specifically declaratory and injunctive relief. In this case, by contrast, we consider only Morrison's claim for *retrospective* relief in the form of nominal damages. Accordingly, like the plaintiffs in *Husain* and unlike the plaintiffs in *Laird,* "the threat or chill that [Morrison] assert[s that he] felt . . . is not merely subjective, but has already been experienced." *Husain,* 494 F.3d at 113 (internal quotation marks omitted).

Additionally, *Laird* was a narrow decision, and the Court took pains to cabin its holding to the particular facts of that case, stating, "[O]ur conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts." *Laird,* 408 U.S. at 15, 92 S.Ct. 2318. Beyond the distinction noted above, this case is very different from *Laird.*

The *Laird* Court emphasized that it faced a case in which "the chilling effect ar[o]se merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Id.* at 11, 92 S.Ct. 2318. To the contrary, in this case (as in a series of other "chilling" cases that the *Laird* Court distinguished), "the challenged

exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the plaintiff was either presently or prospectively subject to the regulations, proscriptions or compulsions that he [i]s challenging." *Id.* at 11, 92 S.Ct. 2318. More specifically, Morrison challenges a *rule* that was intended to govern his speech and that of his cohorts, not data-gathering activities. Consequently, this is not a case in which the plaintiff has "left somewhat unclear the precise connection between" the action or policy complained of and the chill alleged, as was the case in *Laird*. *Id.* at 13 n. 7, 92 S.Ct. 2318. The *Laird* Court's concern regarding a significant attenuation between the action or policy complained of and the chill alleged does not apply here. *See infra* Pt. III.A.2.(b). Moreover, the *Laird* Court was also motivated by its desire to avoid the federal courts becoming "virtually continuing monitors of the wisdom and soundness of Executive action." *Id.* at 15, 92 S.Ct. 2318. This case presents no such threat.

For the foregoing reasons, we conclude that *Laird* does not control, and therefore we follow the lead of the Second, Fifth, Ninth, and Tenth Circuits (in *Husain*,*Howard Gault Co.*, *White*, and *Archer*, respectively). Accordingly, we hold that chilled speech constitutes a sufficient injury-in-fact to satisfy the first part of the test for standing.

b. Causation

Morrison easily satisfies the causation part of the standing inquiry. The Complaint alleges that "[t]he named student plaintiff has refrained from conveying his views on homosexuality to his classmates because the School District policies restricting speech prohibit him from doing so." J.A. at 26 (Compl.¶ 34). Further, Morrison testified through affidavit that he held his tongue because of the policy. This testimony is uncontroverted.

c. Redressability

Finally, we conclude that Morrison satisfies the third part – redressability – of the standing inquiry. Although a favorable decision cannot provide Morrison an opportunity to travel back in time and utter the speech he withheld, it can provide him with nominal damages. Even though these damages amount to little, they serve to vindicate his rights.

Utah Animal Rights Coalition implicitly holds that nominal damages are sufficient to redress an injury similar to Morrison's. In that case, prospective organizers applied for permits to demonstrate on public property during the 2002 Winter Olympics. After the city delayed acting on their application, they sued. While the suit was pending, the city denied their application. They reapplied, and the city then approved this subsequent application, but the litigation did not terminate. After the Olympics had ended, the organizers continued to pursue their suit,

premising a claim for nominal damages upon the city's initial delay. Their asserted injury was akin to Morrison's chilled speech: a hampered ability to plan and coordinate their expressive activities. 371 F.3d at 1256. On appeal, the Tenth Circuit concluded that the organizers had standing to pursue their nominal-damages claim. *Id.*[7] If nominal damages were sufficient to redress the hampering of the organizers' speech activities, then they are also sufficient to redress Morrison's chilled speech.

Along the same lines, *Husain* indicates that a claim for nominal damages is sufficient to redress previously chilled speech. By the time the case reached the Second Circuit, the plaintiffs' claims for injunctive and declaratory relief had become moot, leaving only their claims for nominal compensatory and punitive damages pending. *Husain*, 494 F.3d at 121 n. 10, 135 n. 17. Nonetheless, the *Husain* court held that the college's nullifying the results of a student-government election in response to articles written in a college-sponsored and student-run newspaper chilled the student journalists' speech and accordingly violated their First Amendment rights. As

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[7] Judge McConnell issued a lengthy concurrence disagreeing with the rule that nominal damages are sufficient to thwart a challenge for mootness. *Utah Animal Rights Coal.*, 371 F.3d at 1262-71. Despite his position that nominal damages were "not the real objective of the litigation," *id.* at 1264, and "symbolic only," *id.*, Judge McConnell never questioned whether nominal damages were sufficient to satisfy the redressability prong of the standing inquiry.

in *Utah Animal Rights Coalition,* if the *Husain* plaintiffs' nominal-damages claim was sufficient to redress their chilled speech, then so, too, is Morrison's. Accordingly, Morrison has established the third part of the standing inquiry.

For these reasons, we conclude that Morrison has standing to pursue his free-speech claim seeking nominal damages.

B. Merits

The Board asks us to affirm the district court's grant of summary judgment on the merits, arguing that the policies in effect during the 2004-05 school year were consistent with the standard set out in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). At the same time, Morrison asks us to grant him summary judgment on his nominal damages claim because his affidavit testimony that he withheld his speech because of the policy was uncontradicted, and because the policy, he claims, fails to comport with *Tinker.* We decline both parties' entreaties and instead **REVERSE** the district court's judgment insofar as it pertains to Morrison's free-speech claim seeking nominal damages, and **REMAND** for further proceedings. We do so for two reasons.

First, there remains a genuine issue of material fact regarding the policy applicable to Morrison during the 2004-05 school year. The Board contends that Morrison could not have been disciplined because the

school district's speech policy contained a savings clause preventing it from "apply[ing] to speech otherwise protected under the state or federal constitutions. . . ." J.A. at 120 (2004-05 Sch. Dist. Policy 09.42811). The BCHS Code, by contrast, contains no such savings clause in either of its definitions of harassment. The first definition restricted harassment to "unlawful behavior based on" a protected characteristic, including sexual orientation, "that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment." J.A. at 270 (2004-05 BCHS Student Code at 3). This definition tacks quite closely to the *Tinker* standard. *See Tinker*, 393 U.S. at 513, 89 S.Ct. 733 (holding that schools cannot restrict student speech that neither "materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school" nor "collid[es] with the rights of others"). The other definition, by contrast, does not. Under the heading "DISCIPLINARY INFRACTIONS," the 2004-05 BCHS Code defined harassment to include "the use of language . . . in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual." J.A. at 277 (2004-05 BCHS Student Code at 16). Immediately following this definition, the BCHS Code listed a series of consequences for violating the prohibition on harassment, which could be read as implying that this represents the operative definition of harassment.

If these inconsistencies were not enough, it is also unclear to what extent the statements in the training video represented the school's policy. The video's prohibition appears to have been even broader than the latter definition of harassment in the Student Code, as the video informed students that "[t]here is not permission for you to point . . . out" areas in which they disagree with other students. J.A. at 229 (BCHS Training Video Tr. at 29). Because the district court did not address the merits of Morrison's free-speech claim, it did not have occasion to determine which policy governed Morrison's conduct at school during the 2004-05 academic year. We decline to address this issue in the first instance, concluding that the more prudent course of action is to remand the case to the district court for appropriate factual development.

Second, even if we were certain that the policy violated *Tinker,* we do not believe this alone would be sufficient for Morrison to establish a First Amendment claim premised entirely upon a past chill. Such a holding would permit anyone who had, at one time, operated under an unconstitutional speech policy to sue (within the applicable statute of limitations) and win merely by filing an affidavit claiming that the policy prevented him or her from saying something that he or she wished to say. This would be so even if the speech policy were no longer in existence. The problem with such a scenario is that, because the potential plaintiff never spoke and the regulation in question was never affirmatively applied against him

or her, courts would be unable to tell whether the plaintiff *actually* suffered the alleged harm, i.e., the past chill. Rather than allowing a plaintiff to premise such a claim on purely subjective allegations, we believe that a more objective inquiry is also necessary.

We find support for such a requirement in our case law, specifically in our jurisprudence regarding First Amendment retaliation claims. Plaintiffs alleging such claims must prove that "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in [First Amendment-protected] conduct." *Thaddeus-X v. Blatter,* 175 F.3d 378, 394 (6th Cir.1999) (en banc). This element introduces an objective component into the First Amendment inquiry by requiring that the adverse action "would deter a person of ordinary firmness from" exercising First Amendment rights. Along these lines, we hold that when a plaintiff seeks to prove under the First Amendment a damages claim premised upon a past chill, he or she must establish that the policy or action of the defendant would deter a person of ordinary firmness from exercising his or her First Amendment rights in the way the plaintiff alleges he or she would have, but for the defendant's action or policy. We are not alone in this holding, as the Ninth Circuit requires plaintiffs in similar cases to establish this element. *See White v. Lee,* 227 F.3d 1214, 1228 (9th Cir.2000).

As the parties have not had occasion to address this element, we do not do so either, but instead leave it for the district court to do so on remand.

IV. CONCLUSION

For the reasons described above, we hold that an allegation of a past chill of First Amendment-protected activity is sufficient to confer standing to a plaintiff seeking retrospective relief, even when that relief comes in the form of nominal damages. We further hold that to establish such a claim, a plaintiff must show that the defendant's actions or policy would deter a person of ordinary firmness from exercising his or her First Amendment liberties in the way that the plaintiff alleges he or she would have, were it not for the defendant's conduct or policy. Consequently, we **REVERSE** the district court's grant of summary judgment to the Board, but only insofar as it pertains to Morrison's free-speech claim seeking nominal damages. We also **REMAND** this case to the district court for further proceedings consistent with this opinion.

COOK, Circuit Judge, dissenting.

"This is a case about nothing."[8] The majority burdens a federal district judge with a full-blown trial to determine whether to award the plaintiff a single dollar if a policy no longer in effect was unconstitutional despite never being enforced against the plaintiff. I cannot join an opinion that calls for such an exercise.

I note at the outset that the defendant here is the *school district.* It is not the high school code of conduct, the high school, or any particular administrator. I note further that the plaintiff in this case chose caution and remained silent rather than risk discipline for engaging in protected activity. As much as he (and the attorneys driving this litigation) might wish to keep the facial challenge to the 2004-05 code of conduct alive, the fact remains that they have *already won* that challenge when they forced the district, under court supervision, to change its policy. All that remains is an as-applied pre-enforcement challenge for nominal damages based on Morrison's choice to chill his own speech based on his perception that he would be disciplined for speaking.

But whether he would have been, we can only speculate. And to avoid allowing standing based on guesswork, we require an imminent threat of

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[8] *Husain v. Springer,* 494 F.3d 108, 136 (2d Cir.2007) (Jacobs, C.J., dissenting).

prosecution and an actual intention to violate the policy at issue. *See, e.g., Norton v. Ashcroft,* 298 F.3d 547, 554 (6th Cir.2002); *NRA of Am. v. Magaw,* 132 F.3d 272, 285 (6th Cir.1997). But the school district's – again, the actual defendant here – former discipline policy regarding instances of harassment or discrimination states that it "shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process." I see no evidence in the record that the school district would have punished him for protected speech in violation of its own policy. We cannot find a school district constitutionally liable for chilling student speech every time a student chooses caution over risking possible discipline.

Nor do I see how nominal damages would redress an injury of "past chill." Nominal damages is, as Morrison's counsel discussed at oral argument, a vehicle for a declaratory judgment. *See Utah Animal Rights Coal. v. Salt Lake City Corp.,* 371 F.3d 1248, 1265 (10th Cir.2004) (McConnell, J., concurring). While we may have allowed a nominal-damage claim to go forward in an otherwise-moot case, *see Murray v. Bd. of Trs.,* 659 F.2d 77, 79 (6th Cir.1981), we are not required to relax the basic standing requirement that the relief sought must redress the injury that occurred. And nominal damages based on a regime no longer in existence has *no* effect on the parties' legal rights. *See Utah Animal Rights Coal.,* 371 F.3d at 1264.

This case should be over. The school district has, at the behest of the plaintiffs and intervenors, adopted a policy that properly balances the district's duty to protect openly gay and lesbian students with the important First Amendment right of allowing students to speak their minds. Keeping this case alive for a determination on the constitutionality of an obsolete code of conduct in the hope of awarding the plaintiff a single dollar vindicates no interest and trivializes the important business of the federal courts in protecting actual constitutional violations. My colleagues on the panel having seen the matter differently, I respectfully dissent.

419 F.Supp.2d 937

United States District Court, E.D. Kentucky.
Timothy Allen MORRISON, II, by and through his next friends, Timothy MORRISON and Mary Morrison, Timothy and Mary Morrison, Brian Nolen and Debora Jones, Plaintiffs,
v.
BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY, Defendant,
Sarah Alcorn, William Carter, David Fannin, Libby Fugett, Tyler McClelland and Jane Doe, Intervenor-Defendants.
No. Civ.A. 05-38-DLB.

Feb. 17, 2006.

Joel L. Oster, Kevin Hayden Theriot, Alliance Defense Fund, Leawood, KS, John F. Billings, Greenebaum, Doll & Mcdonald, PLLC, Lexington, KY, Joseph Platt, Cincinnati, OH, for Plaintiff.

Elaina L. Holmes, Kimberly S. McCann, Vanantwerp, Monge, Jones & Edwards, Ashland, KY, Winter R. Huff, Law Offices of John G. Prather, Somerset, KY, for Defendant.

James D. Esseks, Sharon M. McGowan, ACLU Foundation, New York, NY, Lili Solinger Lutgens, ACLU of Kentucky, David A. Friedman, Fernandez, Friedman, Grossman & Kohn, Louisville, KY, for Intervenor Defendant.

MEMORANDUM OPINION AND ORDER

BUNNING, District Judge.

This matter is before the Court upon the parties' cross motions for summary judgment [Docket Nos. 48, 49 and 50]. The motions have been fully briefed by the parties and this matter is now ripe for decision.

I. FACTUAL BACKGROUND

This matter was borne of another lawsuit, *Boyd County High School Gay Straight Alliance, et al. v. Board of Education of Boyd County, et al.*, 03-CI-17-DLB, wherein a group of Boyd County High School students sought to enjoin the defendants from denying their organization, the Boyd County High School Gay Straight Alliance, club status.

Following the issuance of a preliminary injunction, the parties in that case entered into a Consent Decree which required, among other things, that the school put into effect written anti-harassment policies and conduct mandatory staff and student diversity training, a significant portion of which would be devoted to issues of sexual orientation and gender harassment.

Subsequently, the defendant Board of Education of Boyd County, Kentucky (hereinafter "the Board") incorporated written policies into the Middle School and High School Codes of Conduct, which provide, in relevant part:

HARASSMENT/HATE CRIMES (Refer to Harassment Section)

Harassment/discrimination is intimation[sic] by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such a manner as to be commonly understood to convey hatred, contempt or prejudice or have the effect of insulting or stigmatizing an individual.

CONSEQUENCE –

Conference with School Administrator and written documentation about harassment act. Students involve [sic] may also be included in initial conference. One (1) to Five (5) days suspension, Court Referral and local law enforcement agency notified.

The "Harassment Section" is a separate policy, which provides, in relevant part:

Policy 09.42811 – Harassment/Discrimination

Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex, actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.

The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the

speech does not otherwise materially or substantially disrupt the educational process, as defined by policy 09.426, or where it does not violate provisions of policy 09.422.

Just prior to the start of the 2004-2005 school year, the Board conducted the staff training. In early November 2004, the Board conducted the student training at both Boyd County Middle School and Boyd County High School. Pursuant to the Consent Decree's mandate that the training be age appropriate, two versions of the video were produced, for the middle school and high school, respectively. The versions differ only slightly in content. Both training sessions consisted of a one hour video and comments from an instructor. After the video, students were given comment cards as well as the opportunity to ask questions. The training was, as contemplated by the Consent Decree, mandatory and the failure to attend would result in an unexcused absence.

The record reveals that prior to the student training, the parents of several students, including the Plaintiffs, submitted "opt out" notices to the schools and their children, including student-Plaintiff, did not participate in the training. The record further shows that those students received an unexcused absence.

On February 15, 2005, Plaintiffs filed the instant action alleging that the school's polices and practices violate their constitutional rights of free speech, equal protection, and free exercise as well as their

right to direct the ideological and religious upbringing of their children. Specifically, Plaintiffs state that they have sincerely held religious beliefs that homosexuality is harmful to those who practice it and harmful to society as a whole. They further believe that homosexuality is not an immutable characteristic. They state that because they must love and care for others, they must inform those who are engaged in a destructive lifestyle that they are wrong and that they are engaging in behavior that is harmful not only to themselves, but to society as a whole. However, Plaintiffs allege that they are prohibited from conveying their views on homosexuality by virtue of the Boards's [sic] policies and practices. Plaintiffs seek a declaration that the Board's policies and practices are unconstitutional and, further, seek to permanently enjoin Defendants from implementing the same.

The plaintiffs from the prior lawsuit moved to intervene in the this case in order to protect their rights as parties to the aforementioned Consent Decree [Docket No. 11]. This Court permitted the intervention [Docket No. 19].

The Court presided over a prolonged mediation in this matter during which revisions were made to the Board's written policies. The revisions have been filed of record and are set forth in the attachments to Docket No. 63.

Ultimately, the Court ordered the parties to file cross motions for summary judgment [Docket No. 43].

II. SUMMARY JUDGMENT STANDARD

Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the parties' case and on which that party will bear the burden of proof at trial. In such a situation there can be no "genuine issue as to any material fact" as a complete failure of proof concerning an essential element of the non-moving parties' case "renders all other facts immaterial." *Bauer v. Montgomery,* 215 F.3d 656 (6th Cir.2000), citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III. ANALYSIS

A. First Amendment

Plaintiffs allege that the policies and practices of the Board, as embodied in the Codes of Conduct as well as the Fall 2004 training, impinge upon their rights to freedom of speech.

It is well settled that students do not shed their First Amendment rights at the schoolhouse gate. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). However, the First Amendment freedom accorded to students must be viewed "in light of the special characteristics of the school environment." *Id.* at 506, 89 S.Ct. 733. The constitutionality of speech, or regulations of the same, in public schools turns on the identity of the speaker and whether the school is the sponsor, or simply the setting, of the speech. To

that end, there are three categories of speech in the school context: government speech, school-sponsored speech, and student speech. Each category enjoys a different degree of First Amendment protection.

The private, noncurricular speech of students is entitled to almost blanket constitutional protection. A school may restrict only student speech which "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of school" or "impinge[s] upon the rights of other students." *Tinker* at 509, 89 S.Ct. 733. Further limiting the restriction of speech is the requirement that the there be a specific fear of significant disruption. The *Tinker* Court admonished that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508, 89 S.Ct. 733.

As a general matter, government speech – speech by the school itself – too, is given a certain amount of latitude in that it need not be neutral, so long as the speech does not run afoul the Establishment Clause or the Equal Protection Clause. *See e.g. Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

Private expression which is, or reasonably perceived to be, sponsored by the school, such as writings in a school newspaper, is to be examined by the guidelines set forth in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) in which the Supreme Court held that a

school may regulate or otherwise edit student speech which is "inconsistent with its basic educational mission" so long as the regulation is "reasonably related to legitimate pedagogical concerns." *Id.* at 266 and 273, 108 S.Ct. 562. The holding in *Hazelwood* reflects the practical need of authorizing educators to exercise some degree of control on speech bearing the school's imprimatur.

1. Written Policies

With regard to the written policies set forth in the Codes of Conduct, the parties agree that *Tinker* governs. Plaintiffs and Intervenor-Defendants contend that policies in effect for the 2004-2005 school year suffer from constitutional infirmities in light of *Tinker* as well as problems of overbreadth and vagueness. During the mediation in this matter, the parties exchanged various versions of the policies in order to cure the alleged defects. Ultimately, revisions were agreed upon and adopted by the Board in August 2005.

The United States Supreme [sic] has repeatedly and consistently cautioned lower courts to avoid adjudicating constitutional issues where possible. *See United States v. National Treasury Employee's Union,* 513 U.S. 454, 478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (noting a "policy of avoiding unnecessary adjudication of constitutional issues"). *See also Bowman v. Tennessee Valley Authority,* 744 F.2d 1207, 1211 (6th Cir., 1984) ("If we are able to decide this

appeal on non-constitutional grounds we will do so and will not reach the First and Fifth Amendment issues.").

In their current form, the written policies are consistent with *Tinker* and its progeny. Following the high court's directive, this Court is not inclined to adjudge the constitutionality of policies no longer in effect.

2. Student Training

Plaintiffs urge that the Fall 2004 student training impinged upon their First Amendment rights as well.[1] Plaintiffs maintain that while the training is replete with positive statements regarding homosexuality, critical or negative statements are prohibited. Plaintiffs argue that such viewpoint discrimination is unconstitutional.[2] However, Plaintiff [sic] laim fails on both the law and the facts.

In support of their argument, Plaintiffs rely upon *Hansepn v. Ann Arbor Public Schools,* 293 F.Supp.2d

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[1] The script of the training includes references to the written policies. As discussed above, those policies have been revised and the revisions incorporated into the script. Therefore, those portions of the script meet the prevailing constitutional standards and will not be discussed in this opinion.

[2] Discovery exchanged between the parties establishes that the Plaintiffs object to language contained on pages 22-23 and 24-26 of the script of the Middle School video and pages 29-30 and 32-33 of the script of the High School video.

780 (E.D.Mich.2003). In *Hansen,* a high school student was not permitted to speak at a school assembly because she intended to express her view that homosexuality was a sin. In finding that the school had violated the student-plaintiff's First Amendment rights, the District Court ruled that the school had engaged in viewpoint discrimination without articulating a legitimate pedagogical reason for doing so.[3]

Hansen, however, is inapposite to the instant matter. The intended speech in *Hansen* was by a student, at an assembly scheduled by the school for the purpose of discussing diversity. Students had been invited to participate in a panel discussion. Therefore, at issue in *Hansen* was school-sponsored speech, whereas the subject video is speech by the school, or, government speech. Thus, different constitutional standards apply.

In the instant case, the student training is speech by the school and, as such, need not be neutral so long as the viewpoint or content is reasonably related to legitimate pedagogical concerns. *See Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). Yet, the Court, having reviewed the training materials for both the Middle School and High School sessions,

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[3] There appears to be a disagreement amongst the circuits as to whether school-sponsored speech must be viewpoint neutral. However, this Court need not add to the splintered jurisprudence as this case does not involve school-sponsored speech.

finds them to be viewpoint neutral.[4] Absent from both versions of the training is favorable treatment for any particular viewpoint or elevation of one opinion over the other.

Further, with regard to Plaintiffs' claim that their speech was prohibited, there is no evidence in the record that any speech was actually censored. Discovery revealed that the student-Plaintiff did not watch the training video or otherwise participate in the student training. Although Plaintiffs claim that another student, Jordan Delveccio, was improperly punished for objecting to or during the training, they have failed to produce any specific evidence in support of this allegation.

Moreover, following the video, students are given blank cards on which they are asked to comment on the training. The opportunity to speak with regard to the training, without parameters, and with no threat of punishment, belies Plaintiffs [sic] cry of chilling effect. Had the student-Plaintiff attended the training, he would have been given the chance to express his views. Indeed, one such comment card read: "I agree with the fact that no one should be harassed, but I am a Christian. I am a firm believer in Romans where it says that unnatural attraction is wrong. I

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[4] The Court's finding as to the viewpoint neutrality of the training materials has no bearing upon the issue of whether the Fall 2004 student training was in compliance with the Consent Decree.

would never harass a homosexual student. Although I do not approve at all of what they do. Homosexuality is a sin and that is my belief, but it is wrong to harass or bully anyone."

The only restrictions on speech expressed in the training materials pertain to potential student speech and are in line with *Tinker* in that harassing speech which disrupts the educational process will not be tolerated.

Based upon the record before the Court, there is simply no basis for Plaintiffs' First Amendment free speech claim.

B. Free Exercise

Attendant to their freedom of speech claim is the Plaintiffs' assertion that the Defendants burdened the free exercise of their religion. Plaintiffs' claim that the Board violated the Free Exercise Clause of the First Amendment by requiring attendance at the student training, which they contend not only presented, but promoted values contrary to their religious beliefs. Plaintiffs further claim that the Board attempted to change the student-Plaintiff's religious and ideological views regarding homosexuality.

Similarly in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir.1987), a group of students and their parents mounted a free exercise challenge to the use of a set of textbooks which contained views contrary to their religious beliefs. The

Court of Appeals for the Sixth Circuit found that the use of the textbooks in question in the required reading curriculum did not run afoul the free exercise clause. The Court reasoned that "the requirement that students read the assigned materials and attend reading classes, and the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion." *Mozert* at 1065.

Following *Mozert,* it is not enough that Plaintiffs' claim that the mandatory student training offends their religious beliefs. They must establish that it created a burden upon the exercise of their religion. Again, Plaintiffs' claim falls short. There is no evidence that the student-Plaintiff, or any other student, was compelled to disavow his or her religious beliefs. Nor is there evidence that the student-Plaintiff, or any other student, was called upon to endorse homosexuality, bisexuality or transgendered persons.

This case is a far cry from *Citizens for a Responsible Curriculum v. Montgomery County Public Schools,* 2005 WL 1075634 (D.Md.2005) which involved a dispute over the discussion of homosexuality as part of the health education curriculum in the defendant's school system. Included in the curriculum was a "Myths and Facts" handout which included a section entitled "Morality" which purported to address certain attitudes regarding homosexuality, e.g. "homosexuals are sick," "it isn't 'normal' to be

homosexual." *Citizens for a Responsible Curriculum,* 2005 WL 1075634 at *3-5. The "Morality" section included the following:

> Myth: Homosexuality is a sin.
>
> Facts: The Bible contains six passages which condemn homosexual behavior. The Bible also contains numerous passages condemning heterosexual behavior. Theologians and Biblical scholars continue to differ on many Biblical interpretations. They agree on one thing, however. Jesus said absolutely nothing at all about homosexuality. Among the many things deemed an abomination are adultery, incest, wearing clothing made from more than one kind of fiber, and eating shellfish, like shrimp and lobster. Religion has often been misused to justify hatred and oppression. Less than a half a century ago, Baptist churches (among others) in this country defended racial segregation on the basis that it was condoned by the Bible. Early Christians were not hostile to homosexuals. Intolerance became the dominant attitude only after the Twelfth Century. Today, many people no longer tolerate generalizations about homosexuality as pathology or sin. Few would condemn heterosexuality as immoral – despite the high incidence of rape, incest, child abuse, adultery, family violence, promiscuity, and venereal disease among heterosexuals. Fortunately, many within organized religions are beginning to address the homophobia of the church. The Nation Council of Churches of Christ, the Union of

> American Hebrew Congregations, the Unitarian Universalist Association, the Society of Friends (Quakers), and the Universal Fellowship of Metropolitan Community Churches support full civil rights for gay men and lesbians, as they do for everyone else.

In addition, the curriculum contained statements which seemed to elevate certain religious views over others. For example, the Court found that "the Revised Curriculum plainly portrays Baptist churches as willingness expressing the same intolerance attitude towards homosexuals today as they did towards African Americans during segregation." *Citizens for a Responsible Curriculum,* 2005 WL 1075634 at *11. The Court was "extremely troubled by the willingness of [d]efendants to venture – or perhaps more correctly bound into the crossroads of controversy where religion, morality and homosexuality converge." *Id.* Ironically, this case was cited to, and a copy provided to, the Court by the Plaintiffs in their Response to Cross Motions for Summary Judgment [Docket No. 56].

Unlike the curriculum in *Citizens for a Responsible Curriculum v. Montgomery County Public Schools,* the subject student training labors hard to dissociate itself from a particular view and leaves religion to the students and their families. At the end of the videos shown to both the Middle School and High School students, the Compliance Coordinator makes the following statement:

We would never try to influence (your religious beliefs). They are very sacred and they should only be influenced by you, your parents and your family. Please realize that with the video we showed today we are only trying to instill a sense of honor amongst our students to learn not to treat someone unfairly or harass someone because they are different.

Based upon the record before the Court, the inculcation alleged by Plaintiffs simply does not exist. Plaintiffs have failed to demonstrate a burden upon their free exercise rights.

C. Parental Rights

Plaintiffs assert that compulsory attendance at the training impedes upon their right, as parents, to direct the ideological and religious upbringing of their children.

As the Sixth Circuit recently reiterated, "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a right generally to direct *how* a public school teaches their child." *Blau v. Fort Thomas Public School District,* 401 F.3d 381, 395 (6th Cir.2005).

Of particular import to this case is *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir.1995), in which a group of public high school students and their parents claimed that a mandatory school assembly aimed at educating students on AIDS

and other health concerns violated the parents' "fundamental right to direct the upbringing of their children and educate them in accord with their own views." *Brown* at 532. Plaintiffs alleged, *inter alia,* that the program, staged and conducted by the Defendant, included sexually explicit dialogue, "advocated and approved oral sex, masturbation, homosexual activity and condom use during promiscuous premarital sex", and that several minors chosen from the audience participated in "sexually suggestive skits." *Brown* at 529. The parent-plaintiffs also claim that they were not given advance notice of the content of the program or an opportunity to excuse their children from the same. *Brown* at 530.The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The First Circuit affirmed the district court's dismissal and specifically refused to recognize a fundamental right to dictate curriculum. Cautioning against such micromanagement, the Court stated:

> We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach

> their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.

Id. at 533-34 (citations omitted).

The United States Court of Appeals for the Second Circuit reached the same conclusion in a case filed by a parent seeking to exempt his seventh-grade son from mandatory attendance in health education class. *Leebaert v. Harrington,* 332 F.3d 134 (2nd Cir.2003). In *Leebaert,* the parent-plaintiff argued that certain materials and discussion in the health curriculum conflicted with his sincerely held religious beliefs. The defendant school board was granted summary judgment. The Court found that the mandatory health education class was rationally related to the legitimate goal of educating children regarding health and, thus, plaintiff's son would not be exempt from the school's attendance requirements.

In this case, the Court finds that the purpose of the training, to-wit, to address the issue of harassment at school, including harassment based upon actual or perceived sexual orientation, is rationally related to a legitimate educational goal, namely to maintain a safe environment. As such, the Plaintiffs

do not have the right to impede the Board's reasonable pedagogical prerogative, nor do they have the right to opt-out of the same.

Notably, as Intervenor-Defendants point out, Plaintiffs are not requesting that a student absent from the training be considered an "excused" or that the Board offer an alternate assignment on the issue of diversity. Rather, they seek to opt-out of the training altogether. Given the requirements of the Consent Decree, the Board cannot meet this demand. Moreover, as there is no burden on Plaintiffs' freedom of speech, free exercise or other constitutional right, there is simply no basis for an opt-out.

D. Remaining Claims

As for the Plaintiffs' remaining claims, they are equally untenable. There is simply no evidence that the Plaintiffs were denied equal protection under the Board's policies and practices.

With regard to Plaintiffs' claim for injunctive relief, in order to secure an injunction, Plaintiffs must establish that they have prevailed on the merits and continue to suffer irreparable harm. Given that the lack of factual support for their claims, Plaintiffs cannot prevail upon the merits. As such, injunctive relief is not warranted.

E. Damages, Costs and Fees

To date, Plaintiffs have failed to substantiate their claim for damages. As Defendants point out, even in response to a direct interrogatory, Plaintiffs were unable to specify the measure and amount of their alleged damages. Notably, in their dispositive motion and reply in support of the same, Plaintiffs refer only to "nominal damages." [Docket Nos. 50 and 62]. However, even their request for nominal damages remains unsupported by any factual allegations.

The only possible basis the Court can discern for any award of damages to Plaintiffs is the limited period of time during which the Board's written policies which were constitutionally suspect. Yet, again, Plaintiffs have made no specific plea.

As for fees, the case law is clear. Absent statutory authorization, a prevailing party will not be awarded fees. *See generally, Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Therefore, Defendants will not be awarded fees. Moreover, as Plaintiffs have not prevailed, any argument on their part for fees is futile.[5]

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[5] As for the Intervenor-Defendants, any argument they may have in this regard will be considered in *Boyd County High School Gay Straight Alliance, et al. v. Board of Education of Boyd County, et al.*, 03-CI-17-DLB.

IV. CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** as follows:

(1) Defendants' Motion for Summary Judgment [Docket No. 48] shall be **SUSTAINED** with regard to Plaintiffs' First Amendment free speech claim as it to pertains to the Fall 2004 student training, Plaintiffs' First Amendment free exercise claim, Plaintiffs' Fourteenth Amendment parental rights and substantive due process claim, Plaintiffs' Equal Protection claim and Plaintiffs' claim for a permanent injunction, and **OVERRULED AS MOOT** with respect to Plaintiffs' First Amendment free speech claim regarding the written policies in effect for the 2004-2005 school year;

(2) Plaintiffs' Motion for Summary Judgment [Docket No. 50] shall be **OVERRULED**; and

(3) Intervenor-Defendants' Motion for Summary Judgment [Docket No. 49] shall be **OVERRULED** with regard to Plaintiffs' First Amendment free speech claim as it to pertains to the Fall 2004 student training, be **SUSTAINED** with regard to Plaintiffs' First Amendment free exercise claim, Plaintiffs' Fourteenth Amendment parental rights and substantive due process claim, Plaintiffs' Equal Protection claim and Plaintiffs' claim for a permanent injunction, and **OVERRULED AS MOOT** with respect to Plaintiffs' First Amendment free speech claim

regarding the written policies in effect for the 2004-2005 school year.

A Judgment will be entered contemporaneously herewith.

Nos. 06-5380/5406/5407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY MORRISON, ET AL.,

Plaintiffs-Appellants
(06-5380; 06-5406)/
Cross-Appellees,

v.

BOARD OF EDUCATION
OF BOYD COUNTY,

Defendant-Appellee,

WILLIAM CATER, ET AL.,

Intervenors-Defendants-
Appellees/Cross-Appellants
(06-5407).

ORDER

(Filed Aug. 27, 2008)

BEFORE: MOORE and COOK, Circuit Judges; and ADAMS,* District Judge.

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestions, the petitions for rehearing have been referred to the original panel.

---

* Hon. John R. Adams, United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

115

(2)

No. 08-701

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TIMOTHY ALLEN MORRISON, II, BY AND THROUGH HIS NEXT FRIENDS, TIMOTHY MORRISON AND MARY MORRISON,

Petitioners,

v.

BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly determined that Petitioner lacked standing and could not pursue a claim for even nominal damages.

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The Petitioner's claims were initially considered by the United States District Court, Eastern District of Kentucky, by the same Judge who had been involved in the earlier Equal Access Act proceedings arising out of the formation of the Gay-Straight Alliance at the High School. Judge Bunning was therefore quite familiar with the background of the proceedings. *Morrison v. Board of Education of Boyd County, Kentucky*, 419 F.Supp.2d 937, 939 (E.D. Ky. 2006). Significantly, Judge Bunning found that the student training (diversity training videos) was speech by the school, which was viewpoint neutral. The Court further found that the restrictions on speech expressed in the training materials were "in line with *Tinker* . . . ". *Id.*, pp. 942-943 [citing *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)].

The District Court properly analyzed the issues under the three categories of speech in the school context: government speech, school-sponsored speech, and student speech, with the corresponding degree of First Amendment protection. *Id.*, p. 941. The Court held "that the purpose of the training, to-wit, to address the issue of harassment at school, including harassment based on actual or perceived sexual orientation, is rationally related to a legitimate educational goal, mainly to maintain a safe environment . . . there is no burden on Plaintiffs' freedom of speech, free exercise, or other Constitutional right . . . ". *Id.*, p. 946.

The District Court did not ignore or overlook the Petitioner's claim for nominal damages. Rather, the

Court held "the only possible basis the Court can discern for any award of damages to Plaintiff is the limited period of time during which the Board's written policies were constitutionally suspect. Yet, again, Plaintiffs have made no specific plea." *Id.*

The District Court never held, however, that any of the materials at issue were unconstitutional. Indeed, the Respondent has consistently asserted that the single paragraph complained of in the High School Code of Conduct is ***not*** unconstitutional in light of the history of problems in the Boyd County School District. The Respondent has always maintained that the Board Policies, School Code of Conduct, and training materials were all consistent with *Tinker* and the holding of the Tenth Circuit in *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000).[1]

The first Opinion of the United States Court of Appeals for the Sixth Circuit, *Morrison v. Board of Education of Boyd County*, 507 F.3d 494 (6th Cir.

---

[1] In *West*, language very similar to the language in the Code objected to by Petitioner herein was upheld; one reason was that there had been an undisputed history of disruption of the nature sought to be remedied. *West*, pp. 1365-1366. See also *Tinker*, 393 U.S. 509, *Sypniewski v. Warren Hills Board of Education*, 307 F.3d 243, 261-262 (3rd Cir. 2002), and *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001). With due respect to both the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit, the Respondent herein is rather frustrated by the lack of a due determination in this regard.

2007) determined, in a two (2) to one (1) opinion, that the case should be remanded to determine whether the Petitioner could show that the Respondent's actions or policies "would deter a person of ordinary firmness from exercising his or her First Amendment liberties in the way that the Plaintiff alleges he or she would have, were it not for the Defendant's conduct or policy. Consequently, we **REVERSE** the district court's grant of summary judgment to the Board, but only insofar as it pertains to Morrison's free-speech claim seeking nominal damages." *Id.*, pp. 506-507.

Significantly, the Sixth Circuit did find that the definition of harassment found in the Boyd County High School Code of Conduct "tacks quite closely to the *Tinker* standard." *Id.*, p. 505. The first Sixth Circuit Opinion, however, nevertheless reversed and remanded on the single issue. *Id.*[2]

Judge Cook dissented in the initial Sixth Circuit Opinion, making the following points:

> 1. "The majority burdens a federal district judge with a full-blown trial to determine whether to award the plaintiff a single dollar if a policy no longer in effect was unconstitutional despite never being enforced against the plaintiff." *Id.*, p. 507.
>
> 2. The named Defendant in the litigation was the School District, not the High School

[2] The Sixth Circuit failed to note, however, that the Petitioner did not even watch the training video.

Code of Conduct, the High School, or a particular administrator. *Id.*

3. The facial challenge to the prior Code of Conduct had already been "won" as the provision had been changed. *Id.*[3]

4. The school district's policy (the school district being the actual defendant) included a provision that the policy would "not be interpreted as applying to speech otherwise protected under the state or federal Constitutions where the speech does not otherwise materially or substantially disrupt the educational process." Judge Cook noted she saw "no evidence in the record that the school district would have punished him for protected speech in violation of its own policy." *Id.*

5. Judge Cook did not see how nominal damages would redress an injury of "past chill." "Nominal damages based on a regime no longer in existence has *no* effect on the parties' legal rights." *Id.*

6. "The School District has, at the behest of the Plaintiffs and the Intervenors, adopted a policy that properly balances the District's

---

[3] The Respondent does disagree with the dissenting Judge's characterization that Respondent was "forced . . . under Court supervision to change its policy" as the Respondent attempted persistently to identify what the specific and detailed First Amendment concerns were long before litigation was even instituted in the hopes of avoiding litigation.

> duty to protect openly gay and lesbian students with the important First Amendment right of allowing students to speak their minds. Keeping this case alive for determination on the constitutionality of an obsolete code of conduct in the hope of awarding the plaintiff a single dollar vindicates no interest and trivializes the important business of the federal courts in protecting actual constitutional violations." *Id.*, pp. 507-508.

The Respondent sought rehearing *en banc*. In the interim, the United States Court of Appeals for the Sixth Circuit vacated its prior Opinion, and, in a new Opinion, Judge Cook's views now represent the majority. *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008). The Sixth Circuit ultimately determined that Petitioner did not demonstrate an injury in fact so as to have standing. The Court relied upon precedent both from the United States Supreme Court and the Sixth Circuit to analyze the standing requirement that "a litigant demonstrate either a concrete harm or the threat of such harm." *Id.*, p. 608, citing *Laird v. Tatum*, 408 U.S. 1 (1972); *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 660 (6th Cir. 2007); *Warth v. Seldin*, 422 U.S. 490 (1975).

The Court did review a number of cases, including cases from other Circuits, involving concrete acts such as issuance of a temporary restraining order, an eight month investigation, and alleged seizures of documents. *Id.*, p. 609. The Court likewise reviewed precedent from the Sixth Circuit, the District of Columbia Circuit, and the United States Supreme

Court, on the point that "absent proof of a concrete harm, where a First Amendment Plaintiff only alleges inhibition of speech, the federal courts routinely hold that no standing exists." *Id.*, pp. 609-610. Citing *ACLU, supra*, 493 F.3d at 662, the new Opinion notes that "Morrison cannot point to anything beyond his own 'subjective apprehension and a personal (self-imposed) unwillingness to communicate.' . . . and those allegations of chill, without more, fail to substantiate an injury-in-fact for standing purposes." *Id.*, p. 610.

The final Opinion of the Sixth Circuit is premised on the determination of no injury in fact, and thus no standing. The Sixth Circuit's comment on nominal damages simply flows from its determination on standing. The panel held "while we may have allowed a nominal-damages claim to go forward in an otherwise moot case, see *Lynch v. Leis*, 382 F.3d 642, 646 n.2 (6th Cir. 2004); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981), we are not required to relax the basic standing requirement that the relief sought must redress an actual injury." *Id.*, p. 611.

Judge Moore, who wrote the majority Opinion in the first Sixth Circuit panel Opinion, dissented in this final Opinion.

In the Respondent's Petition for Rehearing *En Banc*, which seemed to precipitate the revised Opinion, the Respondent pointed out the consistency of the Code of Conduct provision with the decision in *West v.*

Derby Unified School District, supra, at footnote 3, especially in light of the history of disruption in this School District as considered under *Castorina v. Madison County School Board, supra*.

The Respondent also explained that to find a chilling effect from that Code of Conduct provision, the Court would have to find that a person of ordinary firmness would have been deterred from speech based upon a single paragraph on a single page of the High School Code of Conduct, which person of ordinary firmness would have had to have ignored the definition of harassment contained in that same Code of Conduct, as well as ignoring the detailed discussion of specific rights to all parties in an harassment investigation, as well as failing to read and consider the actual Board Policy on harassment and discrimination. The Respondent pointed out that for the Petitioner to be successful on remand, he would have to establish that he read only one paragraph on one page in the entire Code of Conduct while ignoring several proceeding pages, ignoring the reporting form on harassment and discrimination, ignoring the readily available resources of Compliance Coordinators, ignoring the definitions set forth in the very same Code of Conduct, and ignoring Board Policy, and yet be found to be "a person of ordinary firmness." The Respondent argued that any student's perception that he or she would be punished merely for expressing the belief that homosexuality was a sin was patently unreasonable considering the totality of the facts and circumstances.

With respect to the training video, the Respondent noted it would be likewise fantastic for the Petitioner to demonstrate that he was chilled by anything in the training video since he did not watch the training video. It would also be unlikely that the Petitioner could establish that a person of ordinary firmness would be chilled by the training video given the overriding statements contained therein which are clearly consistent with the *Tinker* standard for student speech, and, with respect to the school speech on student behavior, consistent with First Amendment jurisprudence governing school speech. See Petition for Rehearing *En Banc*, submitted on behalf of Defendant-Appellee Board of Education of Boyd County, Kentucky, Respondent herein.

Only after the Sixth Circuit vacated the initial Opinion and issued the new panel Opinion did the Petitioner herein, and the Intervenors below, seek rehearing. This is significant, because it is a concession that the only remaining issue was whether the paragraph from the High School Code of Conduct and portion of the training videos would have deterred a person of ordinary firmness from exercising First Amendment rights. The Petitioner did not otherwise challenge the findings and holdings below.

COUNTERSTATEMENT OF THE CASE

A. Policies and Codes

At the outset, a distinction must be made between the actual policies of the Respondent from a school code of conduct. Petitioner was a Boyd County High School student. Petitioner's "policy" claims actually concern only one paragraph of a Code of Conduct enacted by a non-party, the Boyd County High School Site-Based Council. The actual policies of the Respondent herein, the Board of Education of Boyd County, Kentucky, have never been claimed to violate the First Amendment to the United States Constitution.

At all relevant times, the Respondent's policy on Harassment and Discrimination, 09.42811, included the following limitation: "The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions when the speech does not otherwise materially or substantially disrupt the educational process, as defined by Policy 09.426, or where it does not violate provisions of Policy 09.422." (Apx. p. 255).

The definition of harassment/discrimination set forth under that Board policy is as follows:

> Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a

> student's education or creates a hostile or abusive educational environment.

Id.

Board Policy number 09.426, as referenced in the policy on harassment and discrimination, prohibits behavior that materially or substantially disrupts the educational process. Board Policy 09.422 prohibits hazing, bullying, menacing, taunting, verbal or physical abuse of others, or other threatening behavior, which is disruptive of the educational process and interferes with the ability of other students to take advantage of the educational opportunities offered. Thus, in all three relevant Board policies, the prohibited speech is clearly and unambiguously limited to speech which is materially or substantially disruptive of the educational process.[4]

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[4] Boyd County School District, like all school districts in Kentucky, has codes of conduct promulgated in accordance with applicable state law. E.g., KRS 158.148, KRS 158.150. Individual schools are governed by site-based councils, which also have authority to determine specific discipline. KRS 160.345. The Boyd County School District Board policies, including those of record herein, are based upon a policy subscription service provided by the Kentucky School Board Association. The Kentucky School Board Association provides references to both state and federal law. For example, Policy number 09.422 cites both *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *inter alia*. The harassment/discrimination policy does not specifically cite *Tinker*, but, references Policy number 09.422, and specifically includes the same language, i.e., that the policy provisions do not apply to protected speech which does not

(Continued on following page)

The Boyd County High School Code of Conduct similarly defined harassment at the relevant time as follows:

> **Definition of Harassment: Harassment/ discrimination is unlawful behavior based on race, color, national origin, age, religion, sexual actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.** (Bold in original).

The High School Code also set forth the specific rights of all parties to the investigation, including the due process rights of the alleged perpetrator. The right of appeal to the Board of Education was stated. In addition to explaining virtually every step in the investigatory process, the High School Code of Conduct further notified students that if they were not satisfied with the District's response, students could file a complaint with the Office of Civil Rights, and provided the address. (Apx. pp. 271-273). A form for reporting harassment/discrimination by students explicitly references Board Policy number 09.4281. (Apx. p. 266).

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otherwise materially or substantially disrupt the educational process.

The Petitioner bases one of his claims of a First Amendment violation solely on a single paragraph found on page sixteen of the High School Code, which stated at the time as follows:[5]

> **HARASSMENT/HATE CRIMES (Refer to Harassment Section)**
>
> *(Note: bold in original)*
>
> Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.

(Apx. p. 266).

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[5] The Respondent was not "forced" to change this Code of Conduct or other materials, but agreed to do so during the pendency of the litigation. *Morrison v. Board of Education of Boyd County, Kentucky*, 419 F.Supp.2d 937, 940 (E.D. Ky. 2006); cp/cf., *Morrison v. Board of Education of Boyd County*, 507 F.3d 494, 507, Judge Cook dissenting (6th Cir. 2007). In fact, the Board's Policies and School Codes of Conduct, as well as the "diversity training" videos, were all readily available long in advance of the Petitioner's institution of litigation, and neither the Petitioner herein nor the Intervenors below ever made any specific pre-litigation complaint about particular provisions of the materials, despite repeated invitations by the Respondent to do so. The Respondent was not given details of the Petitioner's objections until litigation was well under way, and the Respondent then acted voluntarily and promptly to resolve the concerns of the other parties thereafter.

B. Student Training Videos

The Boyd County School District, in conjunction with the Anti-Defamation League, prepared two videotapes (one for the High School and one for the Middle School) to implement the student training agreed to resolve the prior litigation [Equal Access Act claim arising from formation of a Gay-Straight Alliance and the Boyd County High School with resulting disruption; see *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, Kentucky*, 258 F.Supp.2d 667 (E.D. Ky. 2003)]. After watching the video, students were asked to comment on the training. The students expressed whatever they wished, and were not punished for those expressions. *Morrison*, *supra*, 419 F.Supp.2d 942-943. The Petitioner, however, did not watch the video. *Id.*, p. 943.

The videos began with this statement: "Harassment/discrimination is unlawful behavior based on race, color, national origin, age, religion, actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment. So basically what we're saying here is harassment constitutes an action that will take away a student's right to an education . . . if you are unsure whether something constitutes harassment, feel free to go and talk to your school administrator, your principal, assistant principal, even your teachers and they will help you to understand exactly

what this means if you are unsure." (Apx. p. 224, p. 231).

The videotaped training did include the following statements of an independent (non-school employee) psychologist:

> But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. Just because you believe that does not give you permission to say anything about them. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them. They probably know that you disagree. Most people know that not everybody believes what they believe. Most people know that not everybody is like them. All of us know that on some levels, not everybody likes us. We all know that. It's not something that we need to have pointed out to us. And its not something that you are required to point out to other people.

The above segment is only a small part of the psychologist's overall statements, and a smaller part of the overall training materials. The psychologist's segment concluded in this manner:

> So again, to emphasize the points, the goal of this video is to help educate you about that you can't avoid that there are differences. You can't avoid that you believe other people

> are wrong. You can't avoid that here is a set of people, here is a set of people, here is a set of people, a lot of sets of people, a lot of different ways. The point is harassment and discrimination based upon sexual orientation, real or perceived, and gender identity, real or perceived, will not be tolerated by your school system.

(Apx. pp. 195-196; p. 230).

The training videos ended overall with these words from the High School Compliance Coordinator Matthew Spade:

> In today's video you learned about bullying, you learned about name calling and we hope you learned a little bit about how to treat people with respect, ***and with that respect also comes the school's respect for your beliefs, your religious beliefs and your sense of right and wrong. We would never try to influence those things. They are very sacred and they should only be influenced by you and your parents and family***. Please realize that with the video that we showed today we are only trying to instill a sense of honor amongst our students to learn not to treat someone unfairly or harass someone because they are different from us. If you have any questions about the video that you just saw there will be a short question and answer session at the conclusion of this video. If you do not feel comfortable asking these questions in front of your classmates, feel free to contact the counselors

> through the school email system. We would hope that you would also discuss these issues with your family at home. Thank you. (Emphasis added).

See *Morrison*, 419 F.Supp.2d at 944-945; (Apx. p. 200; p. 234).

Nowhere in the video training was it stated that "homosexuality is a characteristic that cannot be changed . . . ". Nowhere in the video is it stated that "it is wrong to communicate one's objection to the homosexual lifestyle to someone who is homosexual." The Petitioner's claim that students were instructed that the district policy prohibited students from communicating to a homosexual the belief that the homosexual lifestyle was wrong is not in fact supported in the record.

The Petitioner persists in mischaracterizing the Respondent's Answer to the Petitioner's shotgun-style Complaint which instituted the litigation. The Respondent simply stated in its Answer that allegations of the Petitioner were admitted "only to the extent actually consistent with" the materials at issue, and the Respondent denied all allegations inconsistent with the actual materials at issue. This type of Answer was necessitated by the Petitioner's failure to give notice of exactly which Policy provisions, Code provisions, or portions of the lengthy script from the training materials were alleged to so state.

In fact, students were allowed to express their views about the training, about homosexuality, and

about the Gay-Straight Alliance without punishment provided school was not disrupted. *Morrison, supra*, 419 F.Supp.2d at 943. Indeed, the District Court specifically found as follows:

> The opportunity to speak with regard to the training, without parameters, and with no threat of punishment, belies Plaintiffs cry of chilling effect. Had the student-Plaintiff attended the training, he would have been given the chance to express his views. Indeed, one such comment card read: "I agree with the fact that no one should be harassed, but I am a Christian. I am a firm believer in Romans where it says that unnatural attraction is wrong. I would never harass a homosexual student. Although I do not approve at all of what they do. Homosexuality is a sin and that is my belief, but it is wrong to harass or bully anyone." The only restrictions on speech expressed in the training materials pertain to potential student speech and are in line with *Tinker* [*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)] in that harassing speech which disrupts the educational process will not be tolerated.

Id. As noted by the District Court, Petitioner Timothy Morrison, II did not even attend a viewing of the video training.

REASONS FOR DENYING THE PETITION

I. The determination that Petitioner lacked standing is entirely correct and does not conflict with any other applicable precedent

The contention that the present Sixth Circuit Opinion conflicts with other decisions is simply not borne out by the applicable facts and law. In the cases relied upon by Morrison, there was either a concrete adverse action taken under an objectionable statute or policy, or a realistic fear that some adverse action would be taken, and/or a reasonable concern that the objectionable conduct would recur.

For example, in *Steffel v. Thompson*, 415 U.S. 452 (1974), arrest was actually threatened, and a companion was in fact arrested. The Petitioner does not purport that the decision in *Steffel* conflicts with the United States Supreme Court decision in *Laird v. Tatum*, 401 U.S. 1 (1972). Here, as in *Laird*, the Sixth Circuit properly determined that the Plaintiff's claim "resulted from a confluence of subjective perceptions, beliefs, and apprehensions (*Laird* at 13) . . . ", insufficient to allege an injury in fact for standing. *Morrison*, 521 F.3d at 610.

The United States Supreme Court has long held that standing requires something more concrete. As noted by the Sixth Circuit in the present Opinion, the United States Supreme Court has stated "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a

threat of specific future harm." *Morrison*, 521 F.3d at 608, citing *Laird*, *supra*, at 13-14 (other citations omitted). The difference between *Laird* and *Steffel*, is that in the latter, "the threat of arrest was not 'imaginary or speculative' . . . ". Petitioner's Petition for Writ of Certiorari, p. 19, citing *Steffel* at p. 459. Requiring a concrete act is thus not at all inconsistent with *Steffel*, nor is *Steffel* inconsistent with *Laird* or the instant decision. Rather, as the Petitioner has admitted, in *Steffel* there was a concrete threat of arrest which was objectively reasonable.

The First Circuit decision in *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F.3d 26 (1st Cir. 1999), involved a clear, unambiguous prohibition which would arguably apply to proposed conduct. Significantly, the First Circuit noted that the determination of "objective reasonableness demands a frank consideration of the totality of the circumstances, including the nature of the conduct that a particular statute proscribes." *Whitehouse* at 31. Applying the reasoning of the First Circuit to the facts in this case, there is absolutely no conflict. Here, under the totality of circumstances, the Petitioner's claimed chill is not only unreasonable but frankly incredible.

The Second Circuit decision in *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000) is factually inapposite. There, although the defendant stated that it did not interpret the statute as prohibiting the proposed conduct, nevertheless, the Court was concerned that the defendant might

change its mind.[6] The key to understanding *Sorrell*, however, is that the Court concluded that the plaintiff's interpretation was reasonable. As above, no such conclusion could be reasonable with respect to the Petitioner's claimed fear in this case.

Similarly, the other Second Circuit decision cited by Petitioner, *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2nd Cir. 2003) is best understood as a determination that the plaintiff had a reasonable fear that its activity would be proscribed. Again, the facts in this case are simply not analogous with the facts in the Second Circuit case as relied upon by Petitioner.

The Eleventh Circuit decision relied upon by Petitioner, *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001) also presented a reasonable belief that judicial candidates might be punished for expression, even though the opinion of the Judicial Inquiry Commission was merely advisory. There, the advisory opinion unequivocally stated that the conduct at issue violated certain provisions of the canons of judicial ethics. Given that the Judicial Inquiry Commission which issued the advisory opinion also has the authority to enforce those canons against Alabama

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[6] This raises the second aspect of the Opinion at issue, namely, whether there is any standing when there is nothing left to redress because the objectionable provision has been changed and the change is unlikely to be rescinded.

judges, obviously the threat in that situation was concrete and objectively reasonable.

Similarly, in cases otherwise cited below by Judge Moore and Petitioner, the harm was concrete or the threat of harm was concrete. E.g., *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) [lengthy investigation by governmental agency in apparent retaliation for protected expression]; *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988) [threat of criminal prosecution was realistic, however, Legal Aid Society suffered no injury, and lacked standing]; *Husain v. Springer*, 494 F.3d 108 (2nd Cir. 2007) [student election was nullified by college president in response to student newspaper article]; *Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77 (6th Cir. 1981) [editor of school newspaper was fired].

The facts of this case, however, amply demonstrate that Morrison's claim of chill was merely subjective and not based on any reasonable fear; that a person of reasonable firmness would not have been deterred by the policies and procedures in effect from protected speech. The Boyd County School District has voluntarily changed the suspect portions of the Code of Conduct (which appear to have been appropriate pursuant to *West, supra*, in any event) and the videos; there is no reasonable likelihood that the Respondent would permit the schools to return to the former version; that the Petitioner's claim is nothing more than an unsubstantiated and subjective perception insufficient to constitute standing even for

nominal damages. *Laird v. Tatum*, 408 U.S. 1, 10, 13 (1972); *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983); *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 660 (6th Cir. 2007) [the Court noted that the claimed difficulty in determining whether a government policy or practice applies to the plaintiff's proposed conduct does not by itself support standing]; *Lynch v. Leis*, 382 F.3d 642, 647-648 (6th Cir. 2004).

In sum, not only did the Sixth Circuit correctly hold that the Petitioner failed to demonstrate an injury in fact for standing, further, it is respectfully submitted that there is simply no evidence of a constitutional violation in the first place. The materials which the Petitioner objected to would not have, in any event, violated the Petitioner's rights under the First Amendment, as those materials were consistent with established precedent and appropriate under the totality of the facts and circumstances. E.g., *West, supra.*

II. Nominal damages were properly denied

First and foremost, nominal damages were properly denied because, as stated above, the Code of Conduct provision at issue was never unconstitutional. The Petitioner did not even watch the videotaped student training. The Petitioner could not have been a person of ordinary firmness whose speech was chilled in light of the overall context of the School District's student speech policies and materials. The Petitioner did not and could not establish standing.

Second, even if the Petitioner had overcome these hurdles, nevertheless, an award of nominal damages against the Respondent would not have been permissible under these circumstances.

Article III of the Constitution only permits the federal courts to adjudicate actual cases or controversies; a litigant must show that he has suffered or is threatened with an actual injury traceable to the defendant which is likely to be redressed by a favorable decision. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). As the District Court noted, because the Respondent changed the provisions objected to by Petitioner and Intervenors below, any issue over past provisions was moot.

While there are exceptions to the doctrine prohibiting adjudication of moot issues, none of those exceptions apply in this case. To survive dismissal for mootness, the Petitioner would have to show that some secondary or collateral injuries survive, or that the issue is capable of repetition yet evading review, or that, although the Defendant has voluntarily ceased the allegedly illegal practice, there is a reasonable expectation that the alleged illegal practice would resume in the future. E.g., *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652, 2662 (2007). In this case, given the School District's willingness to change specific portions of the Code of Conduct and video training segments, the overall consistency of the District's student's speech policies with the *Tinker* standard, and the lack of any evidence whatsoever that the Respondent ever

permitted an inappropriate interpretation or implementation of the student speech codes and policies, none of the exceptions to the mootness doctrine apply.

Petitioner, however, insists that his claim for nominal damages salvages the case from mootness and requires the District Court to adjudicate the issue. Courts have noted, however, a concern with nominal damages claims being made simply to avoid the otherwise proper dismissal of moot cases, evading the usual prohibition on rendering advisory opinions. E.g., *Arizonans For Official English v. Arizona*, 520 U.S. 43, 71-73 (1997).

The Petitioner ignores the principle that damages, even nominal damages, must still be premised upon a determination of unlawful conduct. E.g., *Carey v. Piphus*, 435 U.S. 247 (1978). In the absence of a constitutional deprivation, a claim for nominal damages obviously does not salvage the litigation from mootness. *Tanner Advertising Group, LLC v. Fayette County*, 451 F.3d 777, 786-787 (11th Cir. 2006). The Petitioner still fails to show that any relief could redress a cognizable Article III injury. Cp./cf., *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83 (1998).

There is a further reason that nominal damages could not be awarded against the Respondent in any event, namely, that the Respondent is entitled to

immunity.[7] Under state law, there is no question that local Boards of Education are agencies of the state. *Clevenger v. Board of Education of Pike County*, 799 S.W.2d 5 (Ky. 1990); *Yanero v. Davis*, 65 S.W.3d 510, 526-527 (Ky. 2001). As such, a Board of Education such as Respondent is entitled to governmental immunity. *Yanero, supra.*

Unfortunately, the law in federal courts in Kentucky on Eleventh Amendment immunity has been confused for many years due to a misunderstanding of the relationship between federal law and state law. The federal courts in Kentucky have routinely held that Kentucky school districts are not entitled to immunity under the Eleventh Amendment. E.g., *Blackburn v. Boyd County Board of Education*, 749 F.Supp. 159 (E.D. Ky. 1990). This misunderstanding appears to stem from cases involving local entities not actually considered state agencies under their applicable state law. E.g., *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Howlett v. Rose*, 496 U.S. 356 (1990). However, when, under state law, it is clear that a school district is a state agency, then, it should also be deemed a state agency for purposes of Eleventh Amendment immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992). The Sixth Circuit has

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[7] The Respondent has consistently so maintained. See Answer, Apx. 36-37.

also indicated that immunity may be a proper consideration in a claim for nominal damages. *Murray, supra* at 79. Accordingly, the Respondent would in any event be immune from *any* damages.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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